TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 379.

JETER CLINTON, J. D. T. McALISTER, A. BURT, BRIGHAM Y. HAMPTON, C. RINGWOOD, W. G. PHILLIPS, WILLIAM HYDE, CHARLES LIVINGSTON, CHARLES CROW, J. READDING, J. TOMS, A. BURT, E. CURTIS, D. W. LEAKER, J. McRAE, J. W. SHARP, P. McKENNON, THOMAS BURCHELL, AND R. SMITH, PLAINTIFFS IN ERROR,

vs.

PAUL ENGLEBRECHT, CHRISTIAN REHMKE, AND FREDERIC LUTZ.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED NOVEMBER, 15, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 379.

JETER CLINTON, J. D. T. McALISTER, A. BURT, BRIGHAM Y. HAMPTON, C. RINGWOOD, W. G. PHILLIPS, WILLIAM HYDE, CHARLES LIVINGSTON, CHARLES CROW, J. READDING, J. TOMS, A. BURT, F. CURTIS, D. W. LEAKER, J. McRAE, J. W. SHARP, P. McKENNON, THOMAS BURCHELL, AND R. SMITH, PLAINTIFFS IN ERROR,

vs.

PAUL ENGLEBRECHT, CHRISTIAN REHMKE, AND FREDERIC LUTZ.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

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1 Territory of Utah supreme court.

At an adjourned term of the supreme court of the United States in the Territory of Utah, held at the court-house, in the city and county of Salt Lake, and Territory of Utah, on the 2nd day of October, in the year of our Lord one thousand eight hundred and seventy-one—

Present, Hon. Ja's B. McKean, chief justice; Hon. C. M. Hawley, and Hon. O. F. Strickland, associate justices; C. Myron Hawley, clerk; M. T. Patrick, United States marshal; and Charles H. Hempstead, United States attorney for Utah Territory; George Walker, bailiff—

2 In the records and proceedings of said court, among other things, are the following, viz:

JETER CLINTON, JOHN D. T. MCALLISTER, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William Phillips, William Hyde, Charles Livingston, Charles Crow, John Reading, James Toms, Alexander Burt, Foster Curtis, David W. Leaker, Joseph McRae, John W. Sharp, P. McKennon, Thomas Burchell, and R. Smith, appellants,
against
PAUL ENGELBRECHT, CHRISTIAN REHMKE, and Frederick Lutz, appellees.

On the 12th day of January, A. D. 1871, came the above-named appellants, by Snow & Hoge, their attorneys, and filed in the office
3 of the clerk of this court a transcript, duly authenticated, of the proceedings of a case lately determined in the district court of the third judicial district of Utah Territory, wherein the above-named appellees were plaintiffs, and the above-named appellants were defendants, appealing from the decision of the court overruling a motion to vacate a verdict and grant a new trial, which transcript is in the words and figures following, viz:

4 TRANSCRIPT.

P. ENGELBRECHT ET AL.
vs.
JETER CLINTON ET AL.

5 At a district court begun and held at the court-house in Salt Lake City, in the third judicial district of Utah Territory, on the 12th day of September, A. D. 1870, among the records and proceedings of said court are the following:

PAUL ENGELBRECHT, CHRISTIAN REHMKE, and Frederick Lutz, plaintiffs,
vs.
JETER CLINTON, JOHN D. T. MCALLISTER, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William Phillips, William Hyde, Charles Livingston, Charles Crow, John Reading, James Toms, John Needham, Alexander Burt, John Smith, Foster Curtis, William Ashman, David W. Leaker, Joseph McRae, John Sharp, John Y. Smith, P. McKernion, Thomas Birchall, and R. Smith, defendants.

On the 1st day of September, A. D. 1870, came the said plaintiffs, by

their attorneys, Baskin & Maxwell, and filed in the clerk's office of this court, a complaint against the said defendants, which complaint is in the words and figures following, to wit:

6 In the 3rd judicial district court, Territory of Utah, Salt Lake County.

PAUL ENGELBRECT, CHRISTIAN RENKLE AND Frederick Lutz, plaintiffs,
vs.
JETER CLINTON, JOHN D. T. MCALLISTER, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William Phillips, William Hyde, Charles Livingston, Charles Crow, John Reading, James Toms, John Needham, Alexander Burt, John Smith, Foster Curtis, William Ashman, David W. Leeker, Joseph McRae, John Sharp, John Y. Smith, P. McKernion, Tho's Birchall & R. Smith, defendants. } Complaint.

7 Paul Engelbrecht, Christopher Rehenke, and Frederick Lutz, partners, doing business at Salt Lake City, Salt Lake County, Utah Territory, plaintiffs, complaining of Jeter Clinton, John D. T. McAllister, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William Phillips, William Hyde, Charles Livingston, Charles Crow, John Reading, James Toms, John Needham, Alexander Burt, John Smith, Foster Curtis, William Ashman, David W. Leaker, Joseph McRae, John Sharp, John Y. Smith, P. McKernon, Thomas Birchall, R. Smith, defendants, say that, heretofore, to wit, on the 27th day of August, A. D. 1870, in the city and county of Salt Lake, Territory of Utah, said defendants then and there being, acting in concert and together, did then & there, with force and arms, unlawfully, willfully, and maliciously destroy of the goods and chattels of these plaintiffs the following, to wit:

41	gallons of Phœnix gin I, imported,	*a* $11 00 G		451 00
42½	" " "	"		467 50
33	" common gin	*a* $5 00		165 00
53	" do.	" "		265 00
42½	" Cognac, imported	" $14 00		595 00
38	" do.	" "		532 00
25	" do.	" "		350 00
40	" do.	" "		560 00
44	" do., II	" $10 00		440 00
21	" do.	" "		210 00

8

42	gallons apple brandy	*a* $8 00	p. gallon	336 00
42	" Cognac, III	" $6 00	"	252 00
24	" do.	" "	"	144 00
32	" do.	" "	"	192 00
30	" common whiskey, II,	*a* $5 00	"	150 00
28	" do. "	"	"	140 00
41¼	" Bleek's whiskey	*a* $6 50	"	269 75
29	" McKay's do.	"	"	188 50
39	" Willow Run do. rye	"	"	253 50
46	" do. do. Bourbon	"	"	299 00
145	" Old Crow do.	" "	"	942 50
41	" Miller's do.	" "	"	266 50
31	" " do.	" "	"	201 50

133	"	Favorite of Kentucky	do.	"	"	864 50
20½	"	do.	do.	"	"	133 25
80½	"	do.	do.	"	"	523 25
45	"	common	do.	$3 00	"	135 00
15	"	Jamaica rum, imported		$12 00	"	180 00
32	"	rum, II		$7 00	"	224 00
41	"	Scotch whiskey		$8 00	"	328 00
47	"	imported port wine		$6 00	"	282 00
22	"	do.		"	"	132 00
25	"	do.		"	"	150 00
122	"	" sherry wine		"	"	732 00
18	"	" " I		$6 50	"	127 00
15	"	" Rhine wine		$15 00	"	225 00
3	"	Angelica wine		$4 50	"	13 50
60	"	claret wine		$5 00	"	300 00
72	"	do.		"	"	360 00

9

55	gallons	claret wine		$4 00	p. gal	220 00
42½	"	white wine		"	"	170 00
36	"	do.		"	"	144 00
28	"	do.		$3 00	"	84 00
55	"	Rhine wine		$15 00	"	825 00
18	"	Spain bitters		$7 00	"	126 00
10	"	tanse' do.		"	"	70 00
32	"	stomach do.		$6 00	"	192 00
42	"	wine vinegar		$1 50	"	63 00
15	"	do.		"	"	22 50
19	"	alcohol		$10 00	"	190 00
3	cases	Angelica wine,		$10 00	pr. case	30 00
1	"	do.		"	"	10 00
2	"	Rhine wine.		$24 00	"	48 00
5	"	do.		"	"	120 00
3	"	do.		"	"	72 00
2	"	white wine.		$7 00	"	14 00
1	"	do.		"	"	7 00
29	"	imported champagne		$95 00	"	2,755 00
5	"	IXL bitters		$18 00	"	90 00
1	"	Star of the Union do.		$16 00	"	16 00
3	"	American life do.		$11 00	"	33 00
2	"	blackberry brandy		"	"	22 00
4	"	do.		"	"	44 00
3	"	Old Tom		$10 50	"	31 50
2	"	kegs old Kentucky whiskey		"	"	21 00
1	"	rye whiskey		$12 00	"	12 00
67	bottles	white wine		$1 25	p. bottle	83 75
11	"	do.		"	"	13 75

10

2	bottles	d'absynthe		$2 50	p'r bot	5 00
4	"	Star of the Union bitters		"	"	10 00
8	"	IXL bitters		"	"	20 00
4	"	old sherry		$2 00	"	8 00
8	"	Cognac		$3 00	"	24 00
11	"	blackberry wine		$1 50	"	16 50
18	"	Am'a life bitters		"	"	27 00
23	"	Red Cloud do.		"	"	34 50
8	"	Baker's do.		$2 50	"	20 00
5	"	do. genuine do.		$28 00	pr. case	140 00
9	"	rum, I		$2 00	pr. bot	18 00
12	"	old Bourbon		$1 50	"	18 00
28	"	do		"	"	42 00
19	"	Rhine wine		$2 00	"	38 00
10	"	Holland gin, I,		"	"	20 00
27	"	diff. syrups		$1 50	"	40 50
11	"	Old Tom		"	"	16 50
26½	"	champagne, II,		$3 00	"	78 00

96	" do.	$5 00	"		45 00
8	" gin, I,	$2 00	"		16 00
15	" cocktails	"	"		30 00
9	" Angelica wine	$1 50	"		13 00
4	" white wine	$1 25	"		5 00
28	" Crow whiskey	$1 50	"		42 00
30	" port wine	$1 75	"		52 50
28	" sherry wine	"	"		49 00
15	" Rhine wine	$2 00	"		30 00
2	lbs. of Cognac oil, imported	$75 00	p. lb.		150 00
8	" lemon oil, do.	$85 00	"		680 00

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7	lbs weekhold or beer do. oil	$80 00	p. lb.		560 00
3	" anis oil do.	$90 00	"		270 00
4	" Maderia oil do.	$95 00	"		380 00
2	" d'absynthe oil do.	$110 00	"		220 00
5	doz. of diff. demijohns,	$30 00	pr. doz		150 00
3	" cut tumblers	$8 00	"		24 00
3	" ale glasses	$7 00	"		21 00
11	" bar tumblers	$2 00	"		22 00
6½	" beer mugs	$6 00	"		39 00
54 barrels, $4 50					243 00
10 kegs $3 50					35 00
1 counter					400 00
Liquor pump					25 00
Measures and funnels					12 00
15 brass faucets, $5 00					75 00

ON STORAGE IN CELLAR.

10 kegs of lager beer, $7 50 p'r keg	
30 empty beer kegs, $8 00	240 00
1 box salmon, 40 lbs., 40c p. lb	16 00
10 tin boxes bloaters, $2 00 pr. box	20 00
1 stone jar, 6 gal., of cheese, 75 lbs. *a* 30c	22 50
800 cigars, Cabanas, $112 00 p. M	89 50
800 do. Bismark, $90 00 "	72 00
	$22,589 75

By then and there breaking and utterly demolishing with sledges, hammers, and axes, the caskets, barrels, bottles, and cases containing the said goods and chattels, and spilling and scattering their con-
12 tents on the ground in the streets of Salt Lake City, and on the floor of a certain cellar in which the same were at the time stored; contrary to the form of the statute in such case made and provided. That the said goods and chattels then and there belonging to the said plaintiffs as aforesaid were of great value, in the aggregate amounting to $22,589 75; and that each article was of the value set opposite it in the foregoing list of said property.

That by reason of the said destruction of the goods and chattels aforesaid the same were rendered and thereby then and there became wholly worthless; that by reason of the premises the said defendants incurred and became liable to the said plaintiffs in a civil action for the penalty fixed by the statute in such case made and provided, to wit, in a sum equal to three times the value of the goods & chattels destroyed as aforesaid.

That the true and actual aggregate value of the said goods and chattels was, as afore-alleged, the sum of $22,589 75; and that by reason of the premises there is now due and payable from the said defendants to the said plaintiffs the sum of $67,769 25, which said sum, or any part

thereof, the defendants have never paid, though often requested so to do.

13 Wherefore said plaintiffs pray judgement against defendants for the sum of $67,769 25, together with costs of suit.

(Signed) BASKIN & MAXWELL,
Att'ys for Plaintiffs.

TERRITORY OF UTAH,
Salt Lake County, :

Christian Rehmke, being first duly sworn according to law, deposes and says that the facts set forth in the foregoing complaint are true.

(Signed) CHRISTIAN REHMKE.

Subscribed and sworn to before me this first day of September, A. D. 1870.

(Signed) W'M S. WALKER, *Clerk.*

Afterward, on the same day, the plaintiffs, by their attorneys, Baskin & Maxwell, filed in the clerk's office of this court the affidavit of Christian Rehmke for an order of arrest, which affidavit is in the words and figures following, viz:

14 In the district court, 3rd judicial district of Utah, Salt Lake County.

PAUL ENGLEBRECHT, CHRISTIAN RHEMKE, AND Frederick Lutz, plaintiffs, *vs.* JETER CLINTON, JOHN D. T. MCALLISTER, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William Phillips, William Hyde, Charles Livingston, Charles Crow, John Reading, James Toms, John Needham, Alexander Burt, John Smith, Foster Curtis, William Ashman, David W. Leaker, Joseph McRae, John Sharp, John Y. Smith, P. McKennion, Thomas Burchall, and R. Smith, defendants.	Affidavit for order of court.

15 Christian Rehmke, one of the above plaintiffs in the above-entitled action, being first sworn according to law, says: That the cause of action in this case arose after the passage, approval, & publication of the act of the legislature of Utah, entitled "An act to regulate proceedings in civil cases in the courts of justice in this Territory, and to repeal certain acts and parts of acts," approved Feb'y 17th, 1870. That it is an action for the recovery of the penalty for the wilful, malicious, & unlawful destruction of property belonging to said plaintiffs in the above-entitled case in manner following: That, heretofore, on the 27th day of Aug't, A. D. 1870, the plaintiffs in the above case were engaged in doing business in the city and county of Salt Lake, Utah Territory, as partners, under the style & firm-name of P. Englebrect & Co., and that they occupied a store in said city; that they were possessed of & owned a large stock of goods, & of great value, to wit, $22,589 75; that, on the said 27th day of August, the defendants in the above-entitled case did, with force and arms, willfully, maliciously, & unlawfully destroy the following goods & chattles of the said plaintiffs, to wit:

41	gallons of Phœnix gin, I, imported	a	11 00		451 "
42½	" do	"	"		467 50
23	" common gin	"	5 00		165 "
53	" do	"	"		265 "
16					
42½	gallons Cognac, I, imported		14 00		575 "
38	" do	"	"		532 "
25	" do	"	"		350 "
40	" do	"	"		560 "
44	" Cognac, II,		10 00		440 "
21	" do		"		210 "
42	" apple brandy		8 00		336 "
42	" Cognac, III,		6 00		252 "
24	" do		"		144 "
32	" do		"		192 "
30	" common whiskey, II,		5 00		150 "
28	" do		"		140 "
41½	" Buck's whiskey		6 50		269 75
29	" McKay's Rum do (rye)		"		188 50
39	" Willow Rum do (Bourbon)		"		299 "
145	" Old Crow do		"		942 50
41	" Miller's do		"		266 50
31	" do do		"		201 50
131	" Favorite of Kentucky whiskey		"		864 50
20½	" " " do		"		133 25
80½	" " " do		"		523 25
45	" common do		3 00		135 "
15	" Jamaica rum, imported		12 00		180 "
32	" rum, II		7 00		224 "
41	" Scotch whiskey		8 00		328 "
47	" imported port wine		6 00		282 "
22	" do		"		132 "
25	" do		"		150 "
122	" sherry wine		"		732 "
17					
18	gallons sherry wine		6 50		127 "
15	" Rhine "		15 00		225 "
3	" Angelica "		4 50		13 50
60	" claret wine, imported		5 00		300 "
72	" do "		"		360 "
55	" white wine "		4 00		220 "
42½	" do		"		170 "
36	" do		"		144 "
28	" do		"		84 "
55	" Rhine wine		15 00		825 "
18	" Spain bitters		7 00		126 "
10	" tansi do		"		70 "
32	" stomach do		6 00		192 "
42	" wine vinegar		1 50		63 "
15	" do		"		22 50
19	" alchohol		10 00		190 "
3	cases Angelica wine		10 00		30 "
1	" do		"		10 "
2	" Rhine wine		24 00		48 "
5	" do		"		120 "
3	" do		"		72 "
2	" white wine		7 00		14 "
1	" do		"		7 "
29	" imported champaigne		95 00		2,755 "
5	" IXL bitters		18 00		90 "
1	" Star of the Union bitters		16 00		16 "
2	" American Life do		11 00		33 "
4	" blackberry brandy		"		22 "
3	" do		"		44 "
18					

3	cases	Old Tom	10 50	31 50
2	"	sup'r old K'y whisky	"	21 "
1	"	rye whiskey	12 00	12 "
67	bottles	white wine	1 25	83 75
11	"	do	"	13 75
2	"	de absynthe	2 50	5 "
4	"	Star of the Union bitters	"	10 "
8	"	IXL bitters	"	20 "
4	"	old sherry	2 00	8 "
8	"	old Cognac, I	3 00	24 "
11	"	blackberry wine	1 50	16 50
18	"	American Life bitters	"	27 "
23	"	Red Cloud do	"	34 50
8	"	Boker do, genuine	2 50	20 "
5	cases	do do, "	28 00	140 "
9	bottles	rum, I	2 00	18 "
12	"	old Bourbon	1 50	18 "
28	"	do	"	42 "
19	"	Rhine wine	2 00	38 "
10	"	Holland gin, I	2 00	20 "
27	"	diff. syrups	1 50	40 50
11	"	Old Tom	"	16 50
26	"	champagne II	3 00	78 "
9	"	do	5 00	45 "
8	"	gin, I	2 00	16 "
15	"	cocktails	"	30 "
9	"	Angelica wine	1 50	13 50
4	"	white wine	1 25	5 "
28	"	Crow whiskey	1 50	42 "
19				
30	bottles	port wine	1 75	52 50
28	"	sherry do	"	49 "
15	"	Rhine do	2 00	30 "
2	tts	Cognac oil, imported	75 00	150 "
8	"	lemon do	85 00	680 "
7	"	Wachholden do	80 00	560 "
3	"	anise do	90 00	270 "
4	"	Maderia do	95 00	380 "
2	"	de absynthe do	110 00	220 "
5	doz	demijohns	30 00	150 "
3	"	cut tumblers	8 00	24 "
11	"	bar do	2 00	22 "
3	"	ale glasses	7 00	21 "
6½	"	beer mugs	6 00	39 "
54		barrels	4 50	243 "
10		kegs	3 50	35 "
		counter		400 "
		liquor pump		25 "
		measures & tunnels		12 "
15		brass faucets		

ON STORAGE IN CELLAR.

10	kegs	lager beer	7 50	75 "
30		empty beer kegs	8 00	240 "
1	box	salmon 40 lbs.	40 c	16 "
10		tin boxes bloaters	2 00	20 "
1		stone jar, 6 gall., cheese, 75 lbs.	30 c	22 50
800		cigars, Cabana, p. M.	112 00	89 50
800		" Bismark	90 00	72 "
				$22 589 75

20 By then and there breaking and utterly demolishing with sledge-hammers & axes, the baskets, barrels, bottles, & cases containing the said goods & chattels, & spilling & scattering their goods & contents on the ground in the streets of Salt Lake City, and on the floor of a certain cellar in which the same were at that time stored, con-

trary to the form of the statute in such cases made & provided; that the said goods & chattles, then & there belonging to said plaintiffs as aforesaid, were of great value—in the aggregate amounting to $22,589 75, & that each article was of the value set opposite it in the foregoing list of said goods & chattels; that, by reason of said destruction of goods & chattels aforesaid, the same were rendered & thereby then & there became wholly worthless; that, by reason of the premises the said defendants incurred & became liable to the said plaintiffs, in a civil action, for the penalty affixed by the statutes in such cases made & provided, to wit, that the true & and actual aggregate value of the said goods & chattels was, as aforesaid, alleged the sum of $22,589 75, & that, by reason of the premises, there is now due and payable from said defendants to the said plaintiffs the sum of
21 $67,769 25, which said sum, or any part thereof, the defendants have never paid, though often requested so to do; & affiant further says that he founds his application of arrest of said defendants upon matters & things set forth in the foregoing affidavit, & that the said plaintiffs have this day commenced a civil action against the said defendants for the above penalty.

(Signed) CHRISTIAN REHMKE.

TERRITORY OF UTAH,
Salt Lake County, ss:

Christian Rehmke, being first duly sworn according to law, deposes & says that the facts set forth in the foregoing affidavit are true.

(Signed) CHRISTIAN REHMKE.

Subscribed & sworn to before me this first day of September A. D. 1870.

(Signed) W'M S. WALKER.

22 (Indorsed:) 3d district court Utah Ter'y. Paul Engelbrecht et al. vs. Jeter Clinton et als. Copy of affidavit for order of arrest. Alexander Burt. Filed Sept'r 1st, 1870. W'm S. Walker, cl'k.

Afterward, on the same day, Honorable O. F. Strickland, judge of said court, issued an order of arrest, and delivered the same to the United States marshall of the Territory, which order of arrest is in the words and figures following, viz:

23 In the 3rd district court of Utah Territory, Salt Lake County.

PAUL ENGLEBRECHT, CHRISTIAN REHMKE, and Frederick Lutz, plaintiffs,
vs.
JETER CLINTON, JOHN D. T. MCALLISTER, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William Phillips, William Hyde, Charles Livingston, Charles Crow, John Reading, James Toms, John Needham, Alexander Burt, John Smith, Foster Curtis, William Ashman, David W. Leaker, Joseph McRae, John Sharp, John Y. Smith, P. McKennion, R. Smith, and Thomas Birchall, defendants. } Order of arrest.

The people of the United States in Utah Territory to the United States marshal of said Territory, greeting:

The above plaintiffs, having commenced an action in the above

24 court, against the above defendants, and it duly appearing to me from the affidavit, submitted on the part of the said plaintiffs, that a sufficient cause of action exists, & that the case is one of those mentioned in section seventy-three of the act of the Territorial legislature of Utah, entitled "An act to regulate proceedings in civil cases in the courts of justice of this Territory, and to repeal certain acts & parts of acts," approved Feb. 17th, 1870, to wit: That said defendants have been guilty of unlawfully, wilfully, & maliciously, & with force of arms, destroying the goods & chattels of said plaintiffs, set forth in said affidavit, contrary to the statute in such case made & provided, & thereby incurred & became liable to said plaintiffs in a civil suit, for the penalty for which said plaintiffs prays judgement in said action against said defendants; &, the necessary undertaking having been given, I, the undersigned judge of said court, by virtue of the authority in me vested by law, do order and require you, the said marshal, forthwith to arrest the said defendants, if they may be found in your jurisdiction, and hold them respectively to bail in said action in the sum of sixty-seven thousand seven hundred & sixty-nine dollars & twenty-five cents ($67,769 25) & that you return this order with your proceedings
25 thereon, to the clerk of said court, on the first day of the September term thereof, to wit, on the 12th day of September, A. D. 1870.

Given under my hand and seal this the 1st day of September, A. D. 1870.

(Signed) O. F. STRICKLAND,
District Judge 3rd District Utah Territory.

(Indorsed:) 3rd district court, Utah Terr. P. Engelbrecht et als. vs. Jeter Clinton et als. Copy of order of arrest. John Y. Smith.

Afterward, on the 10th day of September, A. D. 1870, the defendants, by their attorneys, filed in the clerk's office of this court an undertaking on arrest, which undertaking is in the words and figures following, to wit:

26 *Undertaking on arrest.*

In the 3rd district of Utah Territory, Salt Lake County.

PAUL ENGLEBRECHT ET AL., PLAINTIFFS,
vs.
JETER CLINTON ET AL., DEFENDANTS.

Whereas in a certain action in the district court in & for the 3rd judicial district of Utah Territory, wherein the said Paul Englebrect, Christian Rehmke, Frederick Lutz, are plaintiffs, and Jeter Clinton, John D. T. McAllister, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William Phillips, William Hyde, Charles Livingston, Charles Crow, John Reading, James Toms, John Needham, Alexander Burt, John Smith, Foster Curtis, William Ashman, David W. Leaker, John Sharpe, John Y. Smith, Joseph McRae, P. McKennon, Thomas Burchell, and R. Smith, defendants, an order was duly made & delivered to the United States marshal of said Territory of Utah, (M. T. Patrick,) requiring him forthwith to arrest the said defendants, and to hold them to bail in the sum of sixty-seven thousand seven hundred & sixty-nine dollars & twenty-five cents, ($67,769 25,) and the said United States

marshal having arrested all of said defendants—except the said
27 John Smith—and taken them into custody by virtue of the said order: Now, therefore, we, S. P. Teasdale, William Jennings, Thomas Taylor, H. B. Clawson, William Clayton, Joseph Woodmansee, residents of the city and county of Salt Lake, Utah Territory, by occupation merchants, and F. Little & James Townsend, residents of the city and county aforesaid, and by occupation hotel-keepers, and John Sharp, a resident of said city & county, by occupation a general trader, and L. S. Hills, a resident of said city and county, by occupation a banker, and John Y. Caine, a resident of said city and county, by occupation an editor, hereby jointly & severally bind ourselves to the said plaintiffs in the sum of sixty-seven thousand seven hundred & sixty-nine dollars & twenty-five cents, ($67,769 25,) the amount in said order of arrest mentioned that the said defendants arrested as aforesaid shall all & each of them at all times render themselves amenable to the process of the said court during the pendency of said action, and to such as may be issued to enforce the judgement therein against said defendants, arrested & held as aforesaid, or either of them; or that we will jointly or severally pay to said plaintiffs the amount of any judgement which may be recovered in said action against the defendants arrested & held as aforesaid, or either of them.

28 Given under our hands this the 10th day of September, in the year of our Lord, one thousand eight hundred & seventy.

(Signed) H. B. CLAWSON.
WILLIAM CLAYTON.
F. LITTLE.
JOSEPH WOODMANSEE.
THOMAS TAYLOR.
JOHN T. CAINE.
WILLIAM JENNINGS.
S. P. TEASDEL.
L. S. HILLS.

Witnesses:
(Signed) THO'S WILLIAMS.
THOMAS G WEBBER.
HENRY W. NAISBITT.

Afterward, on the 19th day of September, A. D. 1870, defendants Jeter Clinton, John G. Smith, John Needham, and William Ashman, by their attorneys, Snow & Hoge, and Miner and Stout, filed in the clerk's office of this court their answer to the complaint of the plaintiffs, which answer is in the words & figures following, viz:

29 TERRITORY OF UTAH,
Third Judicial District, Salt Lake County:

Third judicial district court in & for said Territory, September term, A. D. 1870, Hon. J. B. McKean, presiding.

PAUL ENGELBRECHT ET AL.
vs.
JETER CLINTON ET AL.

Jeter Clinton, John Y. Smith, John Needham, and William Ashman, who are sued with John D. T. McAllister & others, come, & for answer to the complaint of said plaintiffs, say that they did not, nor did any of them, acting in concert with the other said defendants, or any of them,

or with each other, on the twenty-seventh day of August, A. D. eighteen hundred and seventy, nor at any other time, at Salt Lake City, or at any other place, unlawfully, *willingly*, and maliciously, nor in any other manner whatsoever, destroy or injure the goods & chattels belonging to said plaintiffs, or to either of them, in said complaint described, nor any of them, nor any part thereof, in manner and form & by the means as said plaintiffs hath in their said complaint alleged.

And for further answer, say that they are not indebted to said plaintiffs, either jointly with themselves or with the other said defendants, or severally, in the sum, manner & form, or in any sum whatsoever as said plaintiffs hath in their said complaint alleged.

And for further answer, say that they, and each of them, expressly & specifically deny each and every allegation in said plaintiffs' complaint. And of this they put themselves upon the county.

(Signed) SNOW AND HOGE.
(Signed) MINOR AND STOUT,
Att'ys for Defendants.

TERRITORY OF UTAH,
3rd Judicial District, Salt Lake County, ss:

We, Jeter Clinton, John Y. Smith, John Needham, and William Ashman, being first duly sworn according to law, on our several oaths do say that we have heard the complaint in this case & the foregoing answer thereto read & know the contents of each, and that from our personal knowledge the matters & things set forth in the foregoing answer are in all respects true.

(Signed) JETER CLINTON.
(Signed) JOHN NEEDHAM.
(Signed) WILLIAM ASHMAN.
(Signed) JOHN Y. SMITH.

Subscribed & sworn to before me this 19th day of September, A. D. 1870.

(Signed) W'M S. WALKER, *Clk.*

Afterward, on the same day, defendants Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William Hyde, William G. Phillips, Charles Livingston, Charles Crow, John Reading, James Toms, Alexander Burt, Foster Curtis, David W. Leaker, Joseph McRae, John W. Sharp, P. McKennon, Thomas Birchall, and R. Smith, by their attorneys, Snow & Hoge and Minor and Stout, filed in the clerk's office of this court their answer to the complaint of the plaintiffs, which answer is in the words & figures following, viz:

TERRITORY OF UTAH:

Third judicial district court, September term, 1870.

PAUL ENGLEBRECHT ET AL.
vs.
JETER CLINTON ET AL.

Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William Hyde, William G. Phillips, Charles Livingston, Charles Crow, John Reading, James Toms, Alexander Burt, Foster Curtis, David W. Leaker, Joseph McRae, John W. Sharp, P. McKennion, Thomas Burchell, and R. Smith who are sued with Jeter Clinton & others for answer to complaint of plaintiffs say:

1st. They deny that the plaintiffs, as partners, are or were the pos-

sessors or owners of the goods & chattels, or any of them, or any part thereof in said complaint described.

2nd. They deny that they, acting in concert among themselves or with the other defendants, or with any of them, unlawfully, wilfully, & maliciously destroyed the goods in the complaint mentioned, or any of them, or any part thereof.

3rd. They deny that the several articles in the list of goods, in
33 said complaint were each of the quality, quantity, and value as in the complaint claimed, and that the aggregate value was the amount therein alleged.

4th. They deny that the goods were rendered wholly worthless, and that there is now due & payable from these defendants, or any of them, to the plaintiffs, the said sum of sixty-seven thousand seven hundred & sixty-nine $\frac{25}{100}$ dollars, or any part thereof.

These defendants, for further answer, say:

1st. That John D. T. McAllister, on the 27th day of August, 1870, & before that time, was marshal of the city of Salt Lake, Territory of Utah; 2nd, that, as such marshal, he, on the 27th day of August, 1870, commanded these defendants to assist him in executing a warrant issued by Jeter Clinton, one of the aldermen of the city of Salt Lake aforesaid, directed & delivered to the said John D. T. McAllister, as such marshal, commanding him to proceed to a certain house therein described, kept by one Paul Englebrecht, in said city, & demolish all things found therein made use of for the purpose of selling or otherwise disposing of spirit'ous or vinous liquors without first obtaining a license from
34 the city council so to do. And in pursuance of the commands of said marshal these defendants did assist in executing said warrant.

3rd. That the damage done the goods & chattels of said plaintiffs in their said complaint described, if done at all, was in the lawful execution of the warrant aforesaid, and not unlawfully nor wilfully and maliciously, as in the complaint alleged.

And this they are ready to verify.

(Signed) SNOW & HOGE,
(Signed) MINER & STOUT,
Att'ys for Defendants.

35 TERRITORY OF UTAH:
3rd Judicial District, Salt Lake County:

We, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William Hyde, William G. Phillips, Charles Livingston, Charles Crow, John Reading, James Toms, Alexander Burt, Foster Curtis, David W. Leaker, Joseph McRae, John W. Sharp, P. McKinnon, Thomas Burchell, and R. Smith, being first duly sworn according to law, on our several oaths do say that we have heard the complaint in this case & the foregoing answer read, & know the contents of each, & that from our personal knowledge the matters & things set forth in the foregoing answer are in all respects true.

(Signed) ANDREW BURT. BRIGHAM Y. HAMPTON.
W'M PHILLIPS. J. W. SHARP.
FOSTER CURTIS. JOHN READING.
JAMES TOMS. CHARLES RINGWOOD.
ABERCANER BURT. WILLIAM HYDE.
JOSEPH MCRAE. CHARLES H. CROW.
DAVID W. LEAKER. CHARLES LIVINGSTON.
ARCHIBALD MCKINNON. THOMAS BURCHALL.
ROBERT SMITH.

Subscribed & sworn to before me this 19th day of September, 1870.
(Signed) W'M S. WALKER, *Clerk.*

36 And afterwards, on the 19th day of September, 1870, John D. T. McAllister, one of the defendants herein, by his attorneys, Snow & Hoge and Miner and Stout, filed in the clerk's office his answer to the complaint of the plaintiffs, which answer is in the words & figures following, viz:

TERRITORY OF UTAH:

Third judicial district court, regular September , 1870. Hon. J. B. McKean.

PAUL ENGLEBRECHT ET AL.
vs.
JETER CLINTON ET AL.

Now comes John D. T. McAl'ister, one of the defendants herein, and for answer to the complaint of the plaintiffs, *and* says he denies each of the allegations in the complaint:

1st. He denies that the plaintiffs are or were the owners of the goods or the possessors of them, or any part thereof.

2nd. He denies that he, acting in concert with the other defendants in the complaint mentioned, or with any of them, or acting by himself, unlawfully, or wilfully, and maliciously, destroyed or injured the said goods, or any of them, or any part thereof.

37 3rd. He denies that the list of articles of the goods alleged to have been destroyed, and each of them, were of the quality, quantity, and value as stated, and that they were of the aggregate value alleged in said complaint.

4th. He denies that the goods were rendered wholly worthless.

5th. He denies that there is now due & payable from this defendant to the plaintiffs the sum of sixty-seven thousand seven hundred & sixty-nine $\frac{25}{100}$ dollars, or any part thereof.

6th. He specifically denies each and every allegation in the complaint.

This defendant, for further answer, says—

1. That, on the 27th day of August, A. D. 1870, one Jeter Clinton was, and for a long time prior thereto had been, & now is, an acting alderman of the city of Salt Lake, Territory of Utah.

2. That he, this defendant, was, on the 27th day of August, A. D. 1870, city marshal of Salt Lake City, within the limits of which the liquor store mentioned in the complaint is situated.

3. That the city council of said city, on the 27th day of October A. D. 1866, pursuant to the authority conferred upon it by the act of
38 the governor & legislative assembly of the Territory of Utah, entitled "An act incorporating Great Salt Lake City, approved January 20th, 1860," and the amendments thereto, passed an ordinance entitled "An ordinance relating to license for the manufacture and sale of spirituous, vinous, and fermented liquors.

4. That among the provisions of the said ordinance are the following, viz: It shall not be lawful for any person or persons to manufacture, sell, or otherwise dispose of any spirituous, vinous, or fermented liquors, nor to establish or keep, or assist in establishing or keeping or conducting, any house or place for the purpose of manufacturing or selling or otherwise disposing of any spirituous, vinous, or fermented liquors

within the limits of this, Salt Lake City, without first obtaining a license from the city council for such purpose.

5. And provisions for obtaining a license for such purposes from the city council for wholesale & retail, and dram shops and bars.

6. Then the following, viz: Any person having reasonable cause
39 to believe that any house or place mentioned in the foregoing sections of this ordinance is established & kept for the purpose of manufacturing, selling, or otherwise disposing of spirituous, vinous, or fermented liquors without first obtaining a license from the city council, and will make oath of the same, describing the place, and, if upon investigation, it shall so appear, the mayor or alderman before whom such complaint has been made, may issue a warrant directed to the city marshal, or any of his deputies, commanding him to enter said house or place, & demolish all things found therein or made use of for the purpose of manufacturing, selling, or otherwise disposing of spirituous, vinious, or fermented liquors, and to arrest the person or persons owning, keeping, or conducting said house or place, & to bring him or them before the court; & such person or persons, on conviction, shall be liable to a fine not exceeding one hundred dollars, and imprisonment not exceeding six months; or both fine & imprisonment, at the discretion of the court.

7. And a provision that any person violating any of the provisions of this ordinance shall be liable to a fine in any sum not exceeding one hundred dollars, & forfeiture of license.

40 8. This defendant further says that, on the said 27th day of August, A. D. 1870, Jeter Clinton, one of the alderman of said city, issued a warrant, as such alderman, in due form, directed & delivered to this defendant, as such marshal, which warrant recited, among other things, that one William G. Phillips appeared before him, the said Clinton, as such alderman, & made oath in due form of law, and in said oath stated, among other things, that one Paul Englebrecht was the owner & keeper of a building situated on Second South street, between East Temple & First East streets, in said city, known as the Merchant's Exchange, & therein he, the said Paul Englebrecht, had a large quantity of spirituous & vinous liquors, as he firmly believed; which said liquors, as the said William G. Phillips firmly believed, *is* established & kept therein by the said Paul Englebrecht for the purpose, among other things, of unlawfully selling & disposing of the same without first obtaining a license from the city counsel for so doing; and that he, the said Jeter Clinton, as such alderman, had investigated the said charge, and, being satisfied that such charge was true in fact; which
41 said warrant commanded this defendant, as such city marshal, forthwith to enter said building, & seize & demolish all things found therein which *is* made use of for the purpose of unlawfully or otherwise disposing of vinous or spirituous liquors, and to arrest the said Paul Englebrecht, and bring him before the said Jeter Clinton, to be dealt with as the law prescribes.

9. This defendant further says that, on the 27th day of August, 1870, after the said warrant had come to his hands, he proceeded to the house therein described & lawfully executed said warrant, as he was therein command', and did not unlawfully, wilfully, or maliciously destroy the goods & chattels in said complaint described, or any part thereof as therein alleged; and the acts alleged as wrongs & injuries, complained of in said complaint, are the same acts herein justified.

Which he is ready to verify.

SNOW & HOGE,
MINOR & STOUT,
Att'ys for Defendants.

42 TERRITORY OF UTAH:

Third judicial district court, Salt Lake County.

I, John D. T. McAllister, being first duly sworn according to law, on oath say that I have heard the complaint in this case, and the foregoing answer read, and know the contents of each, and that from my own knowledge the matters & things set forth in the foregoing answer are in all respects true, except so much as is therein set forth from information & belief, and as to such he believes them to be true.

(Signed) JOHN D. T. McALLISTER.

Subscribed & sworn to before me this 19th day of September, A. D. 1870.

(Signed) W'M S. WALKER, *Clerk.*

43 Afterward, on the 23d day of September, A. D. 1870, the plaintiffs, by their attorneys, Baskin & Maxwell, filed in the office of the clerk of this court their demurrer to the answer of defendants Andrew Burt, et al., which demurrer is in the words and figures, following, to wit:

44 *Demurrer.*

In the 3d district court of Utah Territory.

PAUL ENGELBRECHT ET AL., PLAINTIFFS,
vs.
JETER CLINTON ET AL., DEFENDANTS.

And now come the said plaintiffs, by their attorneys, and demurr to all of the answer herein of Andrew Burt, et al., beginning with, including, & following these words, contained in said answer, to wit, "These defendants for further answer say:"

Because the matter therein contained does not constitute any defence or justification of the matters & things charged in the complaint. Because—

1st. The said Jeter Clinton, as alderman of Salt Lake City, had no jurisdiction or authority to issue the warrant described in said answer.

2nd. Said warrant is void upon its own face.

3rd. Said warrant did not direct the destruction of the property of said plaintiffs, described in said complaint.

4th. Said warrant did not, as required by law, describe the property to be seized and destroyed.

45 5th. Said warrant did not direct the destruction of any such property as that described in said complaint.

(Signed) BASKIN & MAXWELL,
Att'ys for Plaintiffs.

And afterward, on the same day, the plaintiffs filed in the office of the clerk of this court, by their attorneys, Baskin & Maxwell, their demurrer to the answer of defendant John D. T. McAllister, which demurrer is in the words and figures following, viz:

46 *Demurrer.*

In the 3rd district court of Utah Territory.

PAUL ENGLEBRECHT ET AL., PLAINTIFFS,
vs.
JETER CLINTON & OTHERS, DEFENDANTS.

And now come said plaintiffs, by their attorneys, & demurr to the matter contained in the answer of the defendant John D. T. McAllister, beginning with and following these words, on the fourteenth line of the 2nd page of said answer, to wit, "This defendant for further answer says," for the following reasons, to wit:

Because said matter does not constitute any defence or justification of the matters & things charged in the complaint of plaintiffs. Because—

1st. The said Jeter Clinton, as alderman of Salt Lake City, had no jurisdiction or right to issue the warrant set forth in said answer.

2nd. Said warrant is void upon its own face.

3rd. Said warrant did not direct the destruction of the property of said plaintiffs described in said complaint.

47 4th. Said warrant did not, as required by law, describe the property to be seized and destroyed.

5th. Said warrant did not direct the destruction or seizure of any such property as that described in the complaint of plaintiffs.

(Signed) BASKIN & MAXWELL,
Att'ys for Plaintiffs.

And, afterwards, on the 28th day of October, A. D. 1870, the defendants, by their attorneys, Snow & Hoge, and Miner & Stout, filed in the clerk's office of this court a challenge to the array of petit jurors, which challenge is in the words and figures following, viz:

48 TERRITORY OF UTAH,
Third Judicial District, Salt Lake County:

Third judicial dist. court in & for said Territory, September term, A. D. 1870, Hon. Ja's B. McKean, judge.

PAUL ENGELBRECHT ET AL.
vs.
JETER CLINTON ET AL.

Now come the defendants in the above-entitled case, &, before the empanneling and swearing of the jurors herein, challenge the array of the traverse jurors herein returned for the following reasons, viz:

1st. That the jurors herein returned were summoned by M. T. Patrick, U. S. marshal for Utah Territory, and not by the marshal of said Territory, J. D. T. McAllister, Territorial marshal for said Territory, as by-laws of said Territory required.

2nd. That said jurors were summoned promiscuously from the body of the third judicial district of said Territory, and not five jurors from each of the counties of Salt Lake and Davis, and four from each of the counties of Too'le and Weber, pursuant to the order of the Hon. O. F. Strickland, late judge of said third district court, entered of record on the ninth (9) day of August, A. D. 1870.

49 3rd. That said jurors were not selected by the county court clerk of said counties, nor by any of them, and the Territorial or U. S. marshal, as by law required to work, by the act of the governor and legislative assembly of Utah Territory, entitled "An act defining who are exempt from serving on juries, and presenting the mode of procuring grand and petit juries for district courts, & for other purposes," approved Jan. 21st, 1859, and acts amendatory thereof.

4th. That said jurors were not selected, drawn, chosen, called, & summoned pursuant to the laws of Utah Territory, in such case made & provided.

(Signed) SNOW & HODGE,
(Signed) A. MINER & H. STOUT,
Att'ys for Def'ts.

And, thereafter, on the 7th day of Nov'r, 1870, the defendants, by their attorneys, Snow & Hoge and Miner & Stout, filed in the clerk's office of this court a notice of motion for a new trial, which notice is in the words and figures following, viz:

50 TERRITORY OF UTAH,
Third Judicial District, Salt Lake County:

Third judicial district court in & for said Terr'y, Sept. term, A. D. 1870, Hon. Ja's B. McKean, judge.

PAUL ENGLEBRECHT ET AL.
vs.
JETER CLINTON ET AL.

The plaintiffs in the above-entitled case, and their attorneys, will take notice that a motion for new trial will be made in the said case, for the following reasons, to wit:

1st. The court erred in sustaining the demurrer to defendant's challenge to any of jurors.

2nd. The court erred in refusing to each of the defendants the right of six peremptory challenge'.

3rd. The court erred in its instructions to the jury, & by refusing to give all the instructions asked on part of said defendants.

4th. The damages found by the jury are excessive.

5th. The evidence is insufficient to justify the verdict, & the verdict is against the law.

6th. And for other errors in law occurring on the trial of said case & excepted to by defendants.

7th. Improper conduct on part of the officer in charge of the jury.

(Signed) SNOW & HOGE,
(Signed) MINER & STOUT,
Atty's for Defendants.

51 We acknowledge service of a copy of the within notice, this 7th day of November, 1870.

(Signed) BASKIN & MAXWELL,
By GEO. R. MAXWELL,
Att'ys for P. Englebrecht, Rehmke and Lutz.

And thereafter, on the 14th day of November, 1870, the defendants,

by their attorneys, Snow & Hoge and Miner & Stout, filed in the clerk's office of this court, a motion to vacate the verdict herein rendered, which motion is in the words & figures following, viz:

52 TERRITORY OF UTAH:

Third judicial district court, Hon. T. B. McKean, judge.

PAUL ENGLEBRECHT ET AL.
vs.
JETER CLINTON ET AL.

Now come the defendants, by their attorneys, & move the court to vacate the verdict herein rendered & grant a new trial, for the following reasons, which materially affect the substantial rights of those defendants:

1. The damages assessed by the jury are greatly excessive.
2. The evidence is insufficient to justify the verdict.
3. The verdict is contrary to law.
4. The verdict is contrary to law as given to the jury by the court.
5. There is error in law occurring on the trial and excepted by the defendants in this, viz:

1st. The court erred in overruling the challenge to the array of traverse jurors.

2nd. The court erred in not permitting six peremptory challenges for each defendant.

3. The court erred in not ordering the plaintiffs to produce the invoices and books from which the items in complaint mentioned were taken by the plaintiff Rehmke.

53 3. The court erred in charging the jury that if there was no malice proved the plaintiffs in this suit could recover the value of the goods.

4. The court erred in charging the jury that the seventh section of the city ordinance was void.

5. The court erred in charging the jury that the warrant under which the goods were destroyed was void on its face.

6. The court erred in not charging the jury that the affidavit of W'm G. Phillips, before the alderman, pursuant to the 7th section of the ordinance, and the warrant issued by the alderman, constituted a full & complete defence to all of the defendants executing the warrant.

7. The court erred in not charging the jury that if they believed from the evidence the defendants believed it was their right, and it was their duty to destroy the goods, that they must find for the defendants.

8. The court erred in not charging the jury that if they believed from the evidence that there was probable cause for the defendants to believe they had the right to destroy the goods, pursuant to ordinance and warrant, they must find for the defendants.

9. The court erred in refusing to give to the jury the instructions asked for by the defendant's counsel, viz, Nos. 16, 17, 18, & 19.

54 10. In response to the question by the jury to the court *does*—"Does the unlawful entry into the building and the destruction of the goods carry with it constructive or implied malice."

To this the court answered, that if the evidence stopped there it did, and it devolved on the defendants to rebut such implied or constructive malice.

The court erred in giving such instructions to the jury.

11. In response to the question put by the jury to the court—
"Can the jury find a penal verdict against one or more of the defendants and not against the others."
The court instructed the jury that they could not find a partial verdict.
To illustrate: You cannot find as to one defendants $500 00, and as to another $1,000, but your verdict must be against all the defendants for the same sum of money.
The court erred in giving this instruction, it not being in response to the question asked by the jury & tended to mislead them, and did not give the instruction asked for by the jury in this question.

12. The court erred in not reading aloud in open court, the
55 said two questions propounded by the jury, the form & substance of which were unknown to the counsel for the defendants until after the rendition of the verdict.

(Signed) SNOW & HOGE.
(Signed) MINER & STOUT.

Which motion the court then & there pro forma overruled.
And afterwards, on the same day, came the defendants by their attorneys, and filed motion to arrest judgement, which motion is in the words and figures following to wit:

TERRITORY OF UTAH:

Third judicial district court, regular September term, 1870, Hon. J. B. McKean, judge.

PAUL ENGLEBRECT ET AL.
vs.
JETER CLINTON ET AL.

Now come the defendants herein, by Snow & Hoge, H. Stout and A. Miner, their attorneys, and move the court to arrest the judgement in this case for the following reasons, viz:

56 1. It appears from averments in the complaint that the defendants in the act complained of committed a felony, & yet it is not averred that they or any of them have been prosecuted or convicted of said felony, nor is there any excuse why they have not been prosecuted.
2. There is no averment in the complaint that the defendants, or any of them, in the destruction of the goods were actuated by any malice or ill-will against the plaintiffs, or any of them.
3. It is not averred in the complaint that the defendants, nor that any of them, secretly or wantonly, or without the consent of the plaintiff, destroyed the goods therein described, and therefore the complaint does not state facts sufficient to constitute a cause of action for the statute penalty.
4. There is in the same court in the complaint two causes of action set forth, one for a statute penalty insufficiently set forth, and the other for the value of the goods destroyed.

(Signed) SNOW & HOGE.
(Signed) HOSEA STOUT.
(Signed) A. MINER,
Att'ys for Defendants.

57 Know all men by these presents that Paul Englebrecht, of Great Salt Lake City, county of Great Salt Lake, & Territory of

Utah, as principal, and and of said city as sureties, are held & firmly bound unto Great Salt Lake City, in the penal sum of six hundred ($600) dollars, lawful money of the United States, for which sum, well and truly to be paid, we hereby bind ourselves, our heirs, administrators & assigns, jointly and severally, by these presents, sealed with our seals, and dated this first day of August A. D. one thousand eight hundred & seventy.

The conditions of the above obligations are such, that whereas the above-bounden Paul Engelbrecht has granted unto him, by the city council of Great Salt Lake City, a license to keep a store belonging to him, for the purpose of selling spirituous liquors by wholesale, in quantities not less than ten gallons, and bottled liquors in original packages, not to be drank on the premises, in a building belonging to him, situated on Second South street, in said Great Salt Lake City, for the term of three months, commencing of the 1st day of August,
58 1870, & to pay thereon the sum of three hundred dollars, payable in advance:

And the above-bounden Paul Engelbrecht is also required to institute such regulations, in said store, as shall restrain drunkenness, riotous, or disorderly conduct, & keep a cleanly, well-regulated establishment, which shall not be open for the sale of spirituous liquors, between the hours of eleven o'clock at night & four o'clock in the morning.

The police shall have access to the premises at all hours. The above-bounden shall not sell or otherwise dispose of spirituous liquors on the Sabbath day, and he shall observe and do all other things enjoined by the ordinance entitled "An ordinance relating to licenses for the manufacture and sale of spirituous liquors," passed Oct. 27.

Now, if the above-bounden Paul Engelbrecht shall well, truly, & justly observe & comply with the conditions hereinbefore set forth, then this obligation to be null and void; otherwise to remain in full force & virtue.

[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]

Signed, sealed, and delivered in presence of—

59 *No. 776.—License of Paul Engelbrecht, for the sale of liquors by wholesale.*

TERRITORY OF UTAH,
Salt Lake City, ss:

Be it known by these presents that Paul Engelbrecht is licensed by the city council of Salt Lake City, on the 1st day of August, 1870, to sell spirituous liquors by wholesale, in quantities not less than ten gallons, or in original packages, & bottled liquors and wines, only in original packages as imported, and not to be drunk on the premises, at the building belonging to him, situate on Second South street of said city, for the term of three months, at the rate of three hundred ($300) dollars per quarter, payable in advance.

Given under my hand & the corporate seal of Salt Lake City, the day & year first above mentioned.

{ SALT LAKE CITY SEAL, U. T. } (Signed) ROBERT CAMPBELL,
City Recorder.

60 (Indorsed:) No. 776. License of Paul Engelbrecht, for the sale of liquors by wholesale. Rec'd $300 00; do. 2 00; do. 302 50. (Signed) Andrew Burk, S. L. City, Aug. 9th, 1870.

61 TERRITORY OF UTAH,
Salt Lake County, ss:

THE PEOPLE, SALT LAKE CITY,
vs.
PAUL ENGELBRECHT.

To John D. T. McAllister, city marshal of Salt Lake City, or any of his deputies to whom these presents shall come, greeting:

Whereas, on the 27th day of August, 1870, before me, Jeter Clinton, one of the aldermen of the city of Salt Lake, in the county and Territory aforesaid, personally appeared one William G. Phillips, who was by me sworn in due form of law, and who, on his oath did say, among other things, that one Paul Engelbrecht is the owner and keeper of a building situate on Second South street, between East Temple and First East street in said city, known as the Merchant's Exchange, & therein he, the said Paul Engelbrecht, has a large quantity of spirituous and vinous liquor, as he firmly believed, which said liquors, as the affiant firmly believed, is established & kept therein by the said Paul Engelbrecht, for the purpose, among other things, of unlawful selling & disposing of the same without first obtaining a licence from the
62 city council for so doing;

And I, having investigated the same charge, am satisfied the same is true in fact: You are therefore hereby commanded to forthwith, after these presents shall come into your possession, to enter said building and seize and demolish all things by you found therein, which *is* made use of for the purpose of unlawfully selling or otherwise disposing of spirituous or vinous liquors, and that you arrest the said Paul Engelbrecht & forthwith bring him before me to be dealt with as the law provides.

Given under my hand this 27th day of August, 1870.

(Signed) JETER CLINTON,
Alderman of said City.

(Indorsed:)

Def'd'ts' Exhibit "D." Salt Lake City vs. Paul Engelbrecht. Warrant.

I hereby return this writ, having duly served the same by demolishing all liquors found in the within-named house, and having the within-named Paul Engelbrecht now in custody.

(Signed) JOHN D. T. McALLISTER,
City Marshall.

SALT LAKE CITY, *Aug. 29th*, 1870.

63 TERRITORY OF UTAH,
Salt Lake County, ss:

SALT LAKE CITY
vs.
PAUL ENGELBRECHT.

Be it remembered that, on this 27th day of August, 1870, before me, Jeter Clinton, an alderman of the city of Salt Lake, in the Territory of

Utah, & county aforesaid, personally appeared William G. Phillips, a resident of said city, who was by me sworn in due form of law, & who on his oath did say that one Paul Engelbrecht is the owner & keeper of a building situate on the north side of Second South street, & between East Temple & First East street, in said city, known as the Merchants' Exchange. And that in said building he, the said Paul Engelbrecht, is now, & for about twenty days prior to this date he has been, keeping a large quantity of spirituous & vinous liquor, for the purpose of, among other things, *of* unlawfully selling, and otherwise disposing of the same, both at wholesale and at retail, without first obtaining a license from the city council for so doing, in violation of & contrary to the ordinance of said city, passed on the 27th day of October, 1866.

And this affiant further says that, on the twenty-fifth day of
64 August, 1870, & on divers other days and times, between that day & the filing of this affidavit at said building, he, the said Paul Engelbrecht, did unlawfully sell & otherwise dispose of spirituous & vinous liquors in divers & sundry quantities to divers & sundry persons, without first obtaining a license so to do from the city council of said city, & contrary to the ordinance aforesaid.

And that, on the twenty-fifth day of August, 1870, he, the said Paul Engelbrecht, did unlawfully sell & dispose of one bottle of spirituous liquor at said building, to one Joseph Barker, for the sum of one dollar, without first obtaining a license from the city council for so doing, and contrary to the ordinance of said city.

(Signed) W'M G. PHILLIPS.

Subscribed and sworn to before me this day & year first above written.

(Signed) JETER CLINTON,
Alderman.

(Indorsed:) Salt Lake City vs. Paul Engelbrecht. Affidavit filed Aug. 27th, 1870.

65 An ordinance relating to licenses for the manufacture & sale of spirituous, vinous & fermented liquors.

SEC. 1. *Be it ordained by the city council of Great Salt Lake City*, that it shall not be lawful for any person or persons, to manufacture, sell, or otherwise dispose of any spirituous, vinous, or fermented liquors, nor to establish or keep, or to assist in keeping or conducting, any house or place for the purpose of manufacturing, or selling, or otherwise disposing of any spirituous, vinous, or fermented liquors within the limits of this city, without first obtaining license from the city council for such purpose.

SEC. 2. That a wholesale liquor license shall not authorize any person to sell, barter, or deliver any wines, spirituous or fermented liquors in less quantity than ten gallons, or in original packages, and bottled liquors or wines only in original packages as imported, & in no case to be drunk on the premises of the parties so licensed.

SEC. 3. That a retail liquor license shall not authorize the sale of wines or spirituous liquors in a greater quantity than three gallons, and in no case to be drunk on the premises.

66 SEC. 4. That a license to keep a bar, drinking-saloon, or a dram-shop, shall not authorize any person to sell, barter, or deliver, or suffer, or permit to be sold, bartered, or delivered, any spirit-

uous, vinous, or fermented liquors, or any composition of which wines or spirituous liquors form a part in any quantity, except to be drunk on the premises of the person so licensed.

SEC. 5. That all persons so licensed, as set forth in the preceeding section, shall institute such regulations in their houses as shall restrain drunkenness, riotous or disorderly conduct, & shall keep a cleanly, well-regulated establishment, which shall not be open for the sale of liquors between the hours of eleven o'clock at night & four o'clock in the morning, and the police shall have access to the premises at all hours.

SEC. 6. It shall not be lawful for any person to sell or dispose of any spirituous, vinous, or fermented liquors to any person under sixteen years of age or to any Indian, nor to sell or otherwise dispose of any liquors on the Sabbath day.

SEC. 7. Any person having reasonable cause to believe that any house or place mentioned in the foregoing sections of this ordinance is established, or kept for the purpose of manufacturing,
67 selling, or otherwise disposing of spirituous, vinous, or fermented liquors without first obtaining licence from the city council, and will make oath of the same, describing the place, & if, upon investigation, it shall so appear, the mayor or alderman, before whom such complaint has been made, may issue his warrant, directed to the city marshall, or any of his deputies, commanding them to enter said house or place, and demolish all things found therein, made use of for the purpose of manufacturing, selling, or otherwise disposing of spirituous, vinous, or fermented liquors, and to arrest the person or persons owning, keeping, or conducting said house or place, and bring him or them before the court, and such person or persons, on conviction, shall be liable to a fine not to exceed one hundred dollars and imprisonment not to exceed six months, or both fine and imprisonment, at the discretion of the court.

SEC. 8. The city council, on granting licence to any person or persons for the manufacture or sale of any spirituous, vinous, or fermented liquors, shall determine the time for which it shall be given, and the amount to be paid thereon, and shall require bonds with security, and determine the amount thereof, for the due observances of the ordinances, and regulations of the city. Said bonds shall be approved by the mayor or city council, and filed with the recorder.

68 SEC. 9th. Any person, violating any of the provisions of this ordinance, shall be liable to a fine in any sum not exceeding one hundred dollars, and forfeiture of licence.

SEC. 10th. All ordinances and parts of ordinances relating to the manufacture and sale of spirituous, vinous, and fermented liquors, heretofore passed by the city council, are hereby repealed.

Passed October 27th, 1866.

(Signed) DANIEL H. WELLS,
Mayor.
ROBERT CAMPBELL,
City Recorder.

TERRITORY OF UTAH,
Salt Lake City, ss:

This certifies that the foregoing is a true copy of the ordinance passed by the city council Oct. 27th, 1866.

SALT LAKE CITY SEAL, U. S. Given under my hand and the corporate seal of Salt Lake City this 23d day of May, A. D. 1870.

ROBERT CAMPBELL,
City Recorder.

69 (Indorsed:) Def'ts' Exhibit "B." An ordinance relating to licences for the manufacture and sale of spirituous, vinous, and fermented liquors. Filed Nov. 3d, 1870. W'm S. Walker, clerk.

70 TERRITORY OF UTAH,
Salt Lake County:

THE PEOPLE OF SALT LAKE CITY }
vs.
PAUL ENGLEBRECHT. }

To John D. T. McAllister, city marshall of Salt Lake City, or any of his deputies, to whom these presents shall come, greeting:

Whereas on this 27th day of August, 1870, before me, Jeter Clinton, one of the aldermen of the city of Salt Lake, in the county and Territory aforesaid, personally appeared one W'm G. Phillips, who was by me sworn in due form of law, and who, upon his oath, did say, among other things, that one Paul Englebrecht is the owner and keeper of a building situate on Second South street, between East Temple and First East street, in said city, known as the Merchants' Exchange, and therein he, the said Paul Englebrecht, has a large quantity of spirituous and vinous liquor, which he firmly believes; which said liquor, as the affiant firmly believes, is established and kept therein by the said Paul Englebrecht for the purpose, among other things, of unlawfully selling and disposing of the same without first obtaining a license from the city council for so doing;

71 And I having investigated the same charge, and satisfied the same is true in fact: You are, therefore, hereby commanded to forthwith, after these presents shall come to your possession, *to* enter said building, and seize and demolish all things by you found therein, which *is* made use of for the purpose of unlawfully or otherwise disposing of spirituous or vinous liquors, and that you arrest the said Paul Englebrecht, and bring him before me, to be dealt with as the law provides.

Given under my hand this 27th day of August, 1870.

(Signed) JETER CLINTON,
Alderman of said City.

I certify the above to be a correct copy.

(Signed) J. CLINTON, *Ald.*

(Indorsed:) Copy. Salt Lake City vs. Paul Englebrecht. Warrant. Defend't's Exhibit No. 1.

72 *Petition of Paul Englebrecht.*

To the hon. the mayor and members of the city council of Salt Lake City:

GENTLEMEN: Your undersigned petitioner respectfully asks your hon. body to renew his license for a term of three months, to sell liquors by wholesale at street, in said city, and, as in duty bound, your petioner will ever pray.

(Signed) PAUL ENGLEBRECHT.

Dated Salt Lake City, August 4th, 1870.

(Indorsed:) Def'd't's Exhibit "A." Petition of Paul Engle brecht. Recorded, and licence, $300 p'r 3 mos. Bonds as usual. Aug. 5th, 1870.

THE UNITED STATES OF AMERICA,
Territory of Utah:

To all who shall see these presents, greeting:

Know ye that whereas Jeter Clinton was, at the general election held on the 14th day of February, A. D. 1870, duly elected alderman and ex-officio justice of the 4th municipal ward of Salt Lake City, and he having duly qualified as such, as appears by the proper evidence on file in the office of the secretary of the Territory: Therefore, I, J. Wilson Shofer, governor of said Territory, do hereby commission him alderman of said ward and ex-officio justice of the peace, and authorize and empower him to discharge the duties of said office according to law, and to enjoy the rights and emoluments thereunto legally appertaining for the term prescribed by law and until his successor shall be elected and qualified to office.

In testimony whereof I have hereunto set my hand and caused the great seal of said Territory to be affixed.

Done at Salt Lake City this 8th day of April, A. D. 1870, and of the independence of the United States the ninety-fifth.

[SEAL.] (Signed.) J. W. SHOFER, *Governor.*

By the governor:

VERNON H. VAUGHAN,
Secretary of Utah Territory.

(Indorsed:) Def'd't's Exhibit "C."

TERRITORY OF UTAH:

Third judicial district court, regular September term, 1870.—Hon. J. B. McKean, judge.

PAUL ENGELBRECHT ET AL.
vs.
JETER CLINTON ET AL.
} Suit for a statute penalty, &c.

Statement of facts prepared pursuant to the act entitled An act to regulate proceedings in civil cases in the courts of justice in this Territory, and to repeal certain acts and parts of acts, approved Feb'y 17th, 1870, to be used on a motion to set aside the verdict and grant a new trial in this case, and as an appeal, if need be.

1. On the ninth day of August, 1870, the
2. Hon. O. F. Strickland, then the judge
3. of this district court, made an order
4. which was by him duly signed and
5. dated, and which, in other respects, was
6. as follows, viz:

7. TERRITORY OF UTAH,
8. *Third Judicial District Court:*
9. Hon. O. F. STRICKLAND,
10 *Judge.*

1. Being reliably advised that the ends of
2. justice will be materially promoted by so
3. doing, it is ordered that the grand and
4. petit jurors be drawn for the ensuing
5. term of said court as follows: Five grand
6. and five petit jurors from each of the
7. counties of Salt Lake and Davis, and
8. four grand and four petit jurers from
9. each of the counties of Tooele and
10. Weber.
11. Pursuant to the above order, a venire
12. was issued, but not served nor returned.
13. On the 18th day of August, 1870, the Honorable
14. O. F. Strickland, then judge as aforesaid,
15. made another order, duly signed, dated,
16. and entitled, which, in other respects,
17. was as follows:
18. On the application of Cha's H. Hempstead,
19. U. S. attorney, and pursuant to the
20. provisions of law, it is ordered that
21. you issue to the U. S. Marshall a venire
22. commanding him to summon from
23. the body of said district twenty-three
24. good and lawful men to act as grand
25. jurors, and eighteen good and lawful
26. men to act as petit jurors
1. at the ensuing term of said court, and
2. that the same be made returnable on
3. the second Monday, to wit. the 12th day,
4. of September, A. D. 1870, the first day of
5. said term of said court; and hereof
6. fail not.
7. That, pursuant to this last-mentioned
8. order, a venire was issued, served,
9. and returned with a panel of petit
10. jurors of eighteen annexed, but the jurors
11. then summoned were not selected by
12. the county courts of the counties of the
13. third judicial district, nor by any of
14. them, as provided by the act of Utah,
15. nor were they, nor any of them, drawn
16. from the jury-box by the United
17. States marshall, and the clerks of
18. said county courts, nor by any of them;
19. on the contrary, they were summoned
20. by the U. S. marshall promiscuously
21. from the body of the district.
22. When this case was called for trial, and
23. twelve jurors of the panel last aforesaid
24. were placed in the jury-box, the defendants,
25. by their counsel, filed a challenge to
26. the array, which was duly entitled in
27. this case and signed by counsel, and
28. which, in other respects, was as follows:
1. Now came the defendants in the above-
2. entitled case, and, before the empannelling

and swearing the jury herein, challenge
the array of the travers' jurors herein
returned, for the following reasons, viz:
1. That the jurors herein returned
were summoned by M. T. Patrick, U. S.
marshall for Utah Territory, and not by
the territorial marshall of said Territory,
John D. T McAllister, territorial marshal
of said Territory, as by the laws of
said Territory required.
2. That the jurors were summoned
promiscuously from the body of the third
judicial district of said Territory, and
and not five jurors from each of the counties
of Salt Lake and Davis, and four
jurors from each of the counties of
Tooele and Weber, pursuant to the
order of the Honorable O. F. Strickland,
late judge of said third judicial district,
entered of record on the 9th day of
August, 1870.
3. The said jurors were not selected by
county court clerks of said counties, nor
by any of them, and the territorial or
U. S. marshall, as by law required, to wit,
by the act of the governor and legislative
assembly of Utah Territory, entitled
1. An act defining who are exempt from
2. serving on juries, and prescribing the mode
of procuring grand & petit
jurors and juries for district courts, and
for other purposes, approved Jan'y 21st, 1859,
and the act amendatory thereto.
4. That said jurors were not selected,
drawn, chosen, called, and summoned
pursuant to the laws of Utah Territory
in such case made and provided.
To this challenge the plaintiffs, by their
counsel, filed in due form a demurrer.
Upon consideration thereof, *which* the court
sustained the demurrer, and ordered
the trial to proceed. To the sustaining
the demurrer and ordering the trial
to proceed, the defendants, by their counsel,
then and there excepted.

(2.)

After twelve jurors were examined as to
their impartiality and qualifications
and placed in*to* the box, for the purpose
of peremptory challenges, and before any
peremptory challenges were made be either
party, each of the defendants, by their counsel,
claimed the right, and demanded the
exercise thereof, to challenge peremptorily

27. six jurors, but the court overruled
81 1. the demand, and ordered the defendants
2. to unite and agree on their challenges,
3. which was accordingly done. To the order
4. of the court, directing the defendants to agree
5. upon their peremptory challenges, the
6. defendants then and there excepted.

Testimony given.

82 *Statement of the evidence material to be noticed on the motion for a new trial.*

The plaintiff, Rehmke, stated, (the complaint being placed into his hands:)
1. The items in the complaint are
2. in my handwriting; I wrote them
3. down soon after the occurance,
4. and took them from the invoice
5. and books of the plaintiffs.
6. The goods in this complaint
7. were on the 27th day of August, 1870,
8. the property of myself, Paul Engelbrecht,
9. and Frederick Lutz, the
10. plaintiffs. On the morning of the
11. 27th day of August, 1870, Mr. John
12. D. T. McAllister, city marshall of
13. Salt Lake City, between 7 and 8 o'clock,
14. with some twenty or thirty other
15. persons, some of whose names I did not
16. know, came to the plaintiff's
17. store, which is situate on 2d South
18. street, between East Temple and
19. 1st East street, Salt Lake City,
20. having with them axes, sledges,
21. and a dark lantern. Mr. McAllister
22. enquired of me where Paul
83 1. Engelbrecht was. I then informed
2. him that Mr. Engelbrecht was
3 in Little Cottonwood. Mr. McAllister
4. then wanted to know of me
5. who was in charge of the establishment;
6. to which I replied, "I am."
7. Mr. McAllister then read to me a
8. warrant for the destruction of the
9. goods. I said to him, "My God,
10. Mr. McAllister, you are not going
11. to smash everything up." He then
12. turned round and said to the
13. men, "Boys, are you ready?"
14. when the men commenced tearing
15. up the counter, Mr. McAllister giving
16. the orders, and the men, some executing
17. the orders and others giving orders and
18. assisting, &c., until the property mentioned
19. in the complaint was destroyed.

(1. In the matter detailed here from line
2. 15 to line 19, the witness said there was no
3. rough language used nor any abuse given; no
4. swearing, nor drinking, nor smoking; nor did he see
5. any of them take away any liquors or cigars;
6. but I saw arms under some of their coats, which
7. I suppose they were in the habit of wearing, they
8. being policemen of this city, though no arms were drawn
9. nor threats made, but all went off smoothly.)

84 1. The witness here testified to the entire list
2. of goods as given in the complaint, giving
3. quantity, quality, and value, as therein
4. stated, and identified several of the defendants
5. as being there, being several of the
6. city police who were identified.
7. On his cross-examination he said: On
8. the 1st day of August, 1870, himself and
9. Mr. Lutz and Mr. Engelbrecht entered
10. into a partnership and took the goods,
11. being the liquors destroyed of Mr. Engelbrecht,
12. and from that time till the
13. trial they continued in partnership;
14. that, from August 1st to August 27th,
15. they had sold liquor there at retail,
16. but none at wholesale. At the time
17. they entered into partnership the stock
18. was taken, and the way he knew
19. the quantity of liquor destroyed was by
20. those invoices, and by deducting the
21. quantity of the liquor sold, as they
22. kept an account of what was sold,
23. the prices given by him being the same
24. prices mentioned in the complaint.

85 (On arriving at the close of the testimony on line 22 of this page, the defendants, by their council, moved the court for an order on the plaintiffs to produce the books and invoices referred to by the witness, as being better evidence of their contents than the copy taken from them; which motion the court overruled. The defendants then and there excepted.)

86 1. Was their retail prices; that he knew
2. Jeter Clinton, the alderman; he was not
3. there.

(1. This witness was recalled about the close
2. of the plaintiff's testimony, as all the witnesses
3. had testified that Jeter Clinton,
4. the alderman, was not there, and did not
5. take part in the destroying of the
6. goods.)

4. On his being recalled, he testified that,
5. on the same day the liquor was destroyed,
6. he went to Mr. Baskin, to the
7. city hall, to see Alderman Clinton, and
8. when there he heard Mr. Baskin ask
9. him if he authorized that liquor to be

destroyed, to which he replied: "Mr. Baskin, I have always treated you well, and I want you to treat me well. Do you suppose that liquor would have been destroyed without authority?"

(The above is all the testimony on the part of the plaintiffs to identify Jeter Clinton with the destruction of the goods.)

87 PAUL ENGELBRECHT, one of the plaintiffs, testified, on behalf of pl'tffs, that, on the first day of August, I commenced business with Rehmke and Lutz. The price of liquors was as fixed by myself, and were the retail prices. The oils are used in the manufacture of liquors. I do not know the general price of gin; I had no interest in the beer nor in the kegs, nor any of the property on storage. I made application for licence to the city council of Salt Lake City, of the fourth day of August, 1870, the application being made in my own name, and not in the name of the partnership. A licence was granted, but I did not take it out. I gave no notice of the partnership, and there was no change made in the sign at my place of business, but is and has been the same since the formation of the partnership, as before. We, as partners, have not made application to any other source for license to sell liquors.

88 F. H. SIMMONS testified on part of plaintiffs, as follows:

I was near the place called the Merchants' Exchange when the property was destroyed. Mr. McAllister, Hyde, Hampton, and Ringwood were there. These are all I know. The parties appeared to get through the business as expeditiously as possible. There was no disturbance, no loud words.

FREDERICK LUTZ, one of the plaintiffs, testified as follows on part of the plaintiffs:

Mr. McAllister came into the Merchants' Exchange, and asked if Engelbrecht was there. I answered no. Mr. McAllister then asked who was in charge. Rehmke said that he was.

Mr. McAllister then read the warrant to Rehmke, after which the work of destruction commenced. Nothing in particular was said. A smile was on some of their countenances. I asked no questions. The cheese, herring, and salmon belong to Rehmke.

89 THOMAS K. BURKE testified on part of plaintiffs:

I saw Marshall, McAllister and Andrew Burt reading a paper to Rehmke. They then commenced taking an account of things. Some one said it was time the damned thing was bu'sted up, but I do not know who made the remark. I did not see drinking by any one.

ANDREW BURT, one of the defendants, testified on part of plaintiffs, who says: Jeter Clinton was not present at the time of the destruction, and took no part in the destruction.

90 1. LEONARD G. WILKES testified that he 2. was at the Merchants' Exchange on the morning of the 27th of Aug., during the time of the destruction. The barrels were rolled into the streets and the heads knocked in; the bottles thrown violently upon the ground and broken. Did not see Andrew Burt do anything; he had a hammer in his hand. I saw only two or three persons smile; the others proceeded in a business-like manner in the destruction of the property.

SAMUEL SCHOEN testified, on part of plaintiffs, that the counter was first taken out, then barrels were rolled out, and while doing this, they took out the bottles and broke them. They had a dark lantern down in the cellar. I did not go down in the cellar during the time of the destruction. The cellar was dark, and a light was necessary in the day-time.

91 1. GEORGE R. MAXWELL, one of the attorneys 2. for the plaintiffs, testified that he was present a part of the time, and knew some of the persons who were present and took part in the destruction. They appeared to be well organized, and it seemed

to me as if every man knew what he had to do, and how to do it in the shortest possible time. Here the plaintiffs rested their case.

The counsel for defendants then moved the court to non-suit the plaintiffs as to Jeter Clinton, John Y. Smith, John Needham, and William Ashman, and to discharge these defendants. The court sustained the motion as to all these defendants, except Jeter Clinton, and as to Jeter Clinton the court overruled the motion; to which ruling Jeter Clinton, by his counsel, then and there excepted.

92 Testimony given on the part of the defence.

JAMES C. LITTLE testifies: I am a hotel-keeper, with bar attached. I am acquainted with the price of different brands of liquors, especially those I deal in: brandy, whiskey, gin, rum, wines, and champagne. I buy my gin for imported Holland gin, the price of which is from four to six dollars per gallon. Common gin is worth four dollars per gallon; Jamaica rum is worth six $\frac{50}{100}$ dollars; imported wine is worth four $\frac{50}{100}$ dollars per gallon; Sherry wine, the same; Angelica is worth three dollars per gallon; claret wine comes in cases, and is worth $9 00 per case. I am not acquainted with the price of the various bitters mentioned in the complaint.

Cross-examined:

Have not had a conference with any of the defendants, nor with any of their counsel, relative to the prices of the articles I have named, nor have I had a list furnished me.

93 JOHN LOLLAND says:

"Yes, I know the price of imported champagne. It is worth $36 00 per basket. I do not know of any champagne as high as $120 00 per basket. The highest I know of is $42 00 per case, and is the best imported."

ROBERT CAMPBELL says: I reside in Salt Lake City; I am city recorder

and clerk of the city council. It is my duty to issue licences when granted. Application for licence is made by petition to the city council. Paul Engelbrecht petitioned for a licence to sell liquor, which petition was dated on the fourth or fifth of August, 1870. It was signed Paul Engelbrecht. There were no other names signed to it. Here the original petition was presented, and admitted in evidence, marked Exhibit "A." There was no other petition for a licence signed by Paul Engelbrecht alone, or with others as partners.

94 A. BENSON says, his occupation is superintendent of the drug-store of Zion's Co-operative Mercantile Institution. Am acquainted with the market value of liquors in this city. Imported Holland gin, pure article, is worth from six to eight dollars per gallon. Some of our liquors, we get direct from the custom-house in San Francisco. Common gin is worth from $3 00 to $4 00 per gallon; Cognac brandy, highest price, $8 00 to 12 00 per gallon; some No. 2, six to eight dollars; No. 3, five dollars; Willow Run whiskey, four to five dollars per gallon; Bourbon whiskey, from $4 00 to $4 50 per gallon; Old Crow whiskey, four $\frac{50}{100}$ to five dollars; Miller's whiskey, highest price, from three $\frac{50}{100}$ to four dollars; Jamaica rum, imported, good quality, $8 00; No. 2, from four to five dollars; imported port wine, $3 50 to $7 00; sherry, from $4 50 to $6 00; Angelica, from $3 00 to five dollars per gallon; best brands claret wine, from $3 00 to $4 00 per gallon; white wine, retail, from $2 50 to $3 00 per gallon; alcohol, $3 75 per gallon, as good as is imported; imported champagne, from $25 00 to $36 00 per basket; blackberry brandy, $8 00

95 per case; Old Tom, $11 00 per case; best brands rye whiskey, $24 00 per case; best quality old sherry, $1 50 to $2 00 per bottle; Red Cloud, from $7 00 to $9 00 per case; Holland gin, per bottle, best quality, $2 00; cocktails, $1 25 per bottle; common Angelica, from $1 00 to $1 50; white wine, from 90c. to $1 00 per bottle; port wine, from $1 00 to $1 75 per bottle; sherry wine, per bottle, from $1 00 to $2 00; cognac oil, $16 00 per lb.;

oil of lemon, $7 00 lb.; anise oil, $6 40 per lb.; absinthe oil, $12 80 per lb.

Cross-examined:

I have had sixteen years' experience in druggist and liquor business in America and Europe. The co-operative store in this city keeps the best articles of liquors. The valuations I have given are the prices to-day, which are nearly, if not quite, the same they were on the 27th day of August last.

96 1. WILLIAM NAYLOR testified:

That some time in the latter part of the month of July, Paul Engelbrecht's clerk told him he would sell him a basket of their best champagne for $37 50; this was in the Merchants' Exchange.

HENRY DINWOODEY testified:

That he resided in Salt Lake City; that he was by occupation a cabinet-maker. I saw the counters belonging to Paul Engelbrecht in the Merchants' Exchange before it was removed, and know its value. It was worth $225 00 when new; it is worth now $175 00.

G. S. WALKER testified:

That imported champagne would sell for $55 00 per case; but there are other grades that run still higher.

BRIGHAM Y. HAMPTON testified:

That he was present on the morning of 27th August last at the Merchants' Exchange building in this city, and took an inventory of the goods which were in the cellar. I knew the contents of barrels, boxes, & cases from the marks and labels thereon. There were a lot of cigars in the cellar that were not destroyed or injured. I was there and

97 1. assisted by order of the city marshal,
2. John D. T. McAllister.

?. Cross-examination:

I did not hear the destruction of the property talked about before the morning of the 27th. I was notified by Captain B. to tell some men to appear there in the morning. I slept at the hall the night of the 26th; was not present when the papers were made out and the investigation

was had, and did not know whether the complaint had been answered by Engelbrecht or not. I knew there has been a complaint made before Clinton that Engelbrecht was selling liquor without licence.

JAMES E. LYON, testified:

That he was at the Merchants' Exchange at the time the liquor was destroyed. I saw Rehmke, one of the plaintiffs immediately afterward; had conversation with him concerning the value of the property destroyed. Rehmke said there was about $7,000 worth destroyed. He also said there had lately been an inventory taken of the goods, but since that inventory was taken, which showed $7,000, they had received some more goods which would make in all about $10,000 worth of goods destroyed.

JOHN W. SHARP testified that he lived about three-fourths of a mile from the Merchants' Exchange. I got up between five and six o'clock in the morning, and after eating my breakfast started to go to my work at the grocery department of Zion's Co-operative Mercantile Institution; and as I was passing the city hall on my way to work, I was called on to go down to Mr. Engelbrecht's, that is, the Merchants Exchange, and assist in executing a warrant in the hands of Marshall McAllister, which I did, but had no knowledge of the matter previous to being called on.

C. M. DONELSON

Corroborated the testimony of Dinwoodey as to value of counter.

JETER CLINTON testified that he resided in Salt Lake City. Am one of the aldermen of said city. (Here the warrant Exhibit "D" was handed the witness, & was asked if it was issued by him.) Witness answered that it was issued by him as alderman, and shortly thereafter I handed it to the city marshall. The warrant was issued by me in its present form. Judge Snow wrote the warrant; but before attaching my official signature thereto, I inserted in the warrant the word "selling," which was omitted by Snow, and which is in my own handwriting.

McAllister made the return on the warrant in my presence.

Cross-examined:

I did not give Engelbrecht any notice previous to signing the warrant. I proceeded according to law. My views of the law have always been this: when a complaint is filed, it is the duty of an alderman to make investigations to his satisfaction. I called witnesses and examined them until I was satisfied that Engelbrecht had no license, and that he had sold and was selling liquor without licence. I then issued the warrant as before stated. I presume that I slept at my own house the night before, as I am not in the habit of sleeping elsewhere. I got up early in the morning and came to the city hall, as I usually do when business requires it. I met with the city council the evening before. I think McAllister was also there. I do not think that Burt or any of the policemen were present. The destruction of the property was not discussed in the council, but some of the members reproved me for not doing my duty in the premises. The destruction of the property was not determined upon before the investigation, but it was, however, talked of. I spoke to the marshall and told him the thing was running contrary to law and it must be stopped, and wanted him to serve a writ. Brigham Young was not present at the council-meeting, nor have I ever conversed with Brigham Young on this subject. I think some of the police went directly from the city hall to the Merchants' Exchange. The posse gathered there early. They never learned anything concerning this matter. Andrew Burt sleeps at the city hall most of the time. The posse were not present when the affidavit was filed and the investigation was had. None of the defendants were present at the council on the evening previous to the issuing of the warrant, except myself and McAllister. The question was asked in the city council, if Engelbrecht had a license to sell liquor; the recorder answered that he had not. On the 15th of Aug. last, there were three prosecutions before me for selling liquor without license against Engelbrecht. In each case a fine of $100 was assessed, which was not appealed from.

Examined by Snow:
I did not know that Engelbrecht
had any partners until after the destruction.

ANDREW BURT testified that
it is my duty to deliver license, and
collect the money therefor. Engelbrecht
refused to execute the bond required
by ordinance. I then refused to deliver
the license or receive the money therefor.
All the defendants that
were there, were there as a posse by orders
from the city marshal, J. D. T. McAllister.

102 The defendants refer to and make a part of this statement the exhibit' on file, viz:

1. A certified copy of the ordinance of the city.
2. The affidavit of W. G. Phillips.
3. The warrant issued by Alderman Clinton.
4. Copy of the unexecuted bond.
5. Copy of the non-delivered license.
6. Paul Engelbrecht's application for a license, to the city council.
7. Jeter Clinton's commission as alderman.

103 *Charge to the jury.*

After arguments of counsel to the jury were closed, the attorneys for both parties present written requests to the court to make certain charges to the jury.

The court then, at the request of the
defendants, charged the jury that the
legislative assembly of Utah had the legislative
power to confer on Salt Lake City
its charter; that its charter gave the
right and enjoined the duty on the
city council of said city to regulate the
liquor-deal within the city, and, with
the exception of the seventh section, the
ordinance was valid. It then, at the
request of the plaintiffs, charged the
jury that the seventh section of said ordi-
nance was void, and that the warrant
by virtue of which the liquor was destroyed
was void on its face.

104 The counsel for the defendants conceded that the liquor had been destroyed under the warrant, but controverted the ownership, quantity, and value thereof, and denied the unlawful allegation and the willfullness and maliciousness of the destruction; and the court, at the request of the plaintiffs, charged the jury that all of the defendants taking part in the destruction were liable in this complaint for at least their value.

To the charge that the seventh section of the ordinance was void, and the warrant being void on its face, and the liability of all the defend-

ants taking part in this destruction being liable, the defendants then and there excepted.

The following charges were then and there requested to be
105 given to the jury by the defendants, which were refused, and so excepted to by them.

106 1.

1. Before they can bring in a verdict of guilty against the defendants,
2. or against any of them, they must be satisfied from the evidence
3. that the destruction of the goods was not only unlawful
4. but that they were willfully and maliciously destroyed, and
5. that the def'd'ts, knew, or verily believed, it was unlawful, and
6. then they willfully and maliciously destroyed them.

2.

7. If, on the other hand, the jury believe from the evidence that
8. the defendants, or any of them, believed it was their right and
9. duty to destroy the goods, and acted under such belief,
10. then, though they or some of them might have had malice in
11. their hearts and acted wil'fully, still they are not guilty,
12. and the verdict must be for the defendants.

3.

13. If the jury believe from the evidence there was probable cause
14. for the defendants, or any of them, believing they had a right
15. and it was their duty to destroy the goods, and that they
16. acted under such belief, then the jury must find for
17. such defendant or defendants, as the case may be.

4.

18. That the pl't'ffs having elected to bring their suit against
19. the defendants under the statute, and for a statute penalty,
20. they are now bound by that election, and they must recover,
21. if they recover at all, the penalty. They cannot merely recover
22. the value of the goods.

5.

23. That the jury must be satisfied from the evidence that
24. all the goods alleged to have been destroyed were
25. destoyed, and were of the seperate and aggregate
107 1. value alleged, or they must find for the
2. defendants.
3. Which instructions the court refused to give, but
4. instructed the jury that the destruction of the goods
5. was unlawful, and all who participated therein, however
6. innocent, were liable for at least the value of the
7. goods; but they might consider these things on the question
8. of willfullness and maliciousness; that if the evidence
9. satisfied the jury that part of the goods were owned by
10. the plaintiffs jointly, and a part not so owned, they were

entitled to a verdict for the value of so much as the evidence showed to be theirs.

The defendants then and there excepted.

108

6.

That if they believe from the evidence that Paul Engelbrecht, one of the pl't'ffs, made application to the city council of Salt Lake City on the 4th day of August, 1870, for a license to sell liquor at wholesale at the place where the liquor was destroyed, and then and there kept a sign over the door in his own name, without disclosing the names of the partners, that this was a fraud on the city, and that, being such fraud, the plaintiffs are estopped from setting up a joint or partnership interest in the goods.

7.

That if the jury believe from the evidence that the said Paul Engelbrecht, in the month of May, 1870, made application to the assessor of the United States in the district of Utah for the purpose of paying a special tax for selling liquors at wholesale at the place where the liquor was destroyed, and that afterwards the plaintiffs, though they may have since purchased an interest in the goods, failed to make an application to the same authority for the payment of a special tax as a firm, they are estopped from setting up a joint or partnership interest in the goods.

8.

That if the jury believe from the evidence that Jeter Clinton, one of the defendants herein, on the 27th day of August, 1870, was an acting alderman of said city, then they must find that he, as such alderman, had jurisdiction to take the affidavit and issue the warrant also described in said McAllister's answer.

9.

That if the jury find from the evidence that on the 27th day of August, 1870, one William G. Phillips appeared

109

before Jeter Clinton, as such alderman, and made an affidavit, as alleged, and that the said Clinton issued a warrant as alleged, then it constituted a lawful authority for destroying the goods, if, on examination, the goods were found on the premises.

10.

That if the jury find from the evidence that there was an adjudication, commencing on the 27th day of August and terminating on the 1st day of Sep., 1870, of the matters specified in the said affidavit, it, not having been appealed from, is conclusive evidence of the matters herein stated.

11.

That, though the proceedings had before Alderman Clinton may not have been in all respects technically legal, yet they constituted a full and complete justification to this action for all the defendants.

12.

The court instructs the jury that if from the evidence they verily believe the defendants did not, wil'fully and maliciously, destroy the goods sued for, although the destruction may have been unlawful, they must find for the defendants.

13.

The court instructs the jury that if they believe from the evidence that a portion of the goods destroyed and sued for were owned by Christian Rehmke, another portion by a man by the name of Wagener, and a third portion by the plaintiffs, they must find for the defendants.

14.

The court instructs the jury that if they believe from the evidence that any or all of the defendants named in the answer of Andrew Burt and others were acting under the orders of, and were called on by, the city marshal, John D. T. McAllister, to assist him in the execution of a warrant issued by Jeter Clinton, as alderman of Salt Lake City, they must find for the defendant or defendants so acting.

15.

The defendants ask the court to instruct the jury that if they find from the evidence that Christian Rehmke was present at the time of, and witnessed the destruction of, the property commanded by warrant, which was directed against the property of Paul Engelbrecht, and did not inform the officer executing said warrant that he was the owner or joint owner thereof, he is estopped from claiming the penalty given by statute or the value of the property destroyed; which instructions the court refused to give, and the defendants then and there excepted.

The jury, after a deliberation of about ten hours, returned into court, and presented, in writing, the following questions, viz:

1.

Does the unlawful entry into the building in question, and the destruction of the goods therein, carry with it constructive or implied malice?

23. Can the jury find a penal verdict against one or more
24. of the defendants, and not against the others?

25. To which the court, without reading it to the counsel, said
111 1. to the jury that the unlawful entry into the building, and
2. destroying the goods, did carry with it implied malice,
3. and that it was for the defendants to satisfy them that
4. malice did not exist. They could not find a verdict
5. against some for one sum and against another for
6. another sum of money, but their verdict must be
7. against all for the same amount of money.

Erroneous. McKean. June 19, 1871.

(Signed) SNOW & HOGE,
(Signed) MINER & STOUT,
Att'ys for Def'd'ts.

(Signed) R. V. BASKIN,
(Signed) GEO. R. MAXWELL,
Att'ys for Pl'ffs.

We, the undersigned attorneys for the respective parties, certify that the foregoing statement of the case has been agreed upon by us and is correct.

Nov. 14, 1870.

(Signed) R. V. BASKIN,
(Signed) GEO. R. MAXWELL,
Att'ys for Pl'ffs.
(Signed) SNOW & HOGE,
(Signed) MINER & STOUT,
Att'ys for Def'd'ts.

(Indorsed:) Paul Engelbrecht et als. vs. Jeter Clinton. Statement of the case. Filed Nov. 27, 1870. (Signed) W'm S. Walker, clerk.

112 And afterwards, on the fifth day of January, A. D. 1871, came the defendants, by their attorneys, and filed a notice of appeal; which notice is in the words and figures following, to wit:

TERRITORY OF UTAH:

Third judicial district court, regular September term, 1870—Hon. J. B. McKean, judge.

PAUL ENGELBRECHT ET AL.
vs.
JETER CLINTON ET AL.

The plaintiffs herein and their counsel will take notice that the defendants herein appeal to the Supreme Court from the decision of this honorable court overruling their motion for a new trial, entered on the 14th day of November, 1870.

November 14th, 1870.

(Signed) SNOW & HOGE,
(Signed) A. MINER, &
(Signed) H. STOUT,
Attorneys for the Defendants.

Dec. 31, 1870.

113 Which notice was endorsed in the words and figures following, to wit:

"We acknowledge service of this notice Jan'y 5, 1871.
(Signed) "R. N. BASKIN,
"*Attorney for Plaintiffs.*"

And afterwards, on the 6th day of January, 1871, the defendants, by Z. Snow, esq., one of their counsel, deposited with the clerk of this court the sum of one hundred dollars, as provided by law, in lieu of an undertaking to abide the event of this appeal.

114 *Record of court.*

MONDAY, *Sept.* 12*th*, 1870.

The de'f'ts herein having filed a motion to set aside the order of arrest, and the return of the officer making the arrest, on the ground that the arrest was made by the U. S. marshal*l*, instead of by the territorial marshal*l*, the said motion was set for argument at 2 p. m. this day.

WEDNESDAY, *Sept.* 21*st*, 1870.

Motion to strike demurrer from the files held under advisement.

THURSDAY, *Oct.* 6*th*, 1870.

This day came the parties, by their respective attorneys; and said case having heretofore been submitted for the decision of the court on the question whether a demurrer and answer could be filed to the same cause of action at the same time, and the court, being fully advised in the premises, is satisfied that the said demurrer and answer cannot stand together. It is therefore ordered that the said demurrer be, and the same is hereby, stricken out with leave to the defendants to stand by their answers; whereupon the defendants, in open court,
115 announce their intention of standing by their said answers.

THURSDAY, *October* 13*th*, 1870.

Demurrer to all the answers except that of Jeter Clinton.
Argument by Maxwell, for pl't'ffs; Hoge for d't'd'ts.

FRIDAY, *Oct.* 14*th*, 1870.

Argument continued by Snow for def'ts.
Snow concluded his argument, followed by Baskin for *def'ts* [pl't'ff's.]
Argument concluded; held under advisement.

MONDAY, *Oct.* 24*th*, 1870.

The presiding judge read his written opinion, overruling the demurrer herein; whereupon plaintiffs, by their counsel, announced that they were ready to proceed to trial.
Deferred to an early day.

THURSDAY, *Oct.* 27*th*, 1870.

Set for to-morrow.

FRIDAY, *Oct.* 28*th*, 1870.

This cause being ready for trial, the petit jury was called, and Isaac Sisson, W'm G. Higley, Tho's J. Shelton, Frank M. Clarke, Hiram Rice, Tho's D. Brown, & Jno. Cunnington answered. The mar-
116 shal*l* being ordered to summon talesmen to fill said jury, Levi

Garrett, Cha's Popper, Heber P. Kimball, Cha's Crissman, and Ja's M. Allen were duly summoned and empan'elled.

Defendants, by their counsel, here interpose their challenge to the array of petit jurors; to which challenge plaintiffs, by their counsel, demur, and the court sustains the demurrer; to which rulings def'ts, by their counsel, duly except. The jurors were thereupon sworn on their voir dire; and, upon examination, Isaac Sisson being excused for cause, on plaintiffs' motion, additional talesmen were summoned; and being sworn on their voir dire as called, the empan'elling of the jury was proceeded with, as follows:

Isaac Sisson, excused for cause, on motion of pl't'ffs.
W'm G. Higby, same, same.
Tho's J. Shelton, accepted.
Frank M. Clark, accepted.
Hiram Rice, excused for cause, on motion of pl't'ffs.
Thomas D. Brown, challenged perempt'ly by d'f'ts.
John Cunnington, excused for cause, on motion of pl't'ffs.
Levi Garrett, same, same.
Charles Popper, same, same.
Heber P. Kimball, challenged peremp'ly by def'ts.
Charles Crismon, same, same.
Joseph M. Allen, excused for cause, on motion of pl't'ffs.
A. J. Fitzgerald, same, same.
Fred'r'k Auerback, same, same.
117 Soloman Seigel, excused for cause, on motion of pl't'ffs.
Tho's Carter, same, same.
Louis Cohen, same, same.
Ma. H. H. Walker, same, same.
Samuel Kohn, same, same.
Charles King, same, same.
A. Leventhal, same, def'd'ts.
Jacob Ornstein, challenged peremp'ly by def'd'ts.
Tho's A. Lyne, same, same.
Mathew McKelly, accepted.
Smith Dixon, accepted.
Silas McGuire, accepted.
Dan'l Camomile, excused for cause, on motion of pl't'ffs.
Joseph Silver, same, def'ts.
Samuel S. Walker, same, pl't'ffs.
S. Walters, same, same.
John Kimball, same, same.
John H. Latey, challenged peremptorily by def'd'ts.
Willis Milliken, excused for cause, on motion of pl't'ffs.
John Wright, same, same.
Joseph Dudler, same, same.
James Wells, same, same.
George Pike, same, same.
Isadore Morris, excused, because mail-carrier.
Frank D. Clift, excused for cause, on motion of pl't'ffs.
James Wright, accepted.
James W. Spratt, excused for cause, on motion of def'ts.
Warren Hussey, same, pl't'ffs.
Benj. B. Raybould, same, same.
118 Frank H. Bruner, accepted.

T. B. H. Stenhouse, excused for cause, on motion of pl't'ffs.
John Chislett, same, same.
John Pendleton, challenged perempt'ly by pl't'ffs.
Joseph F. Nounnan, accepted.
James Gordon, challenged perempt'ly by def'd'ts.
Benj. F. Butler, accepted.
Ja's Kiskadden, challenged perempt'ly by pl't'ffs.
Hiram Kimball, accepted.
Isaac Kirkendall, excused for cause, on motion of pl't'ffs.
John Reading, same, d'f'ts.
Theodore Lytle, accepted.
Edward Chambers, excused for cause, on motion of pl't'ffs.
James Brown, challenged perempt'ly by d'f'ts.
John Meeks, excused—an alien.
Henry J. Faust, challenged perempt'ly by pl't'ffs.
Jacob Alt, excused for cause, on motion of pl't'ffs.
G. C. Alexander, accepted.

The following twelve of the above-named persons, examined as aforesaid on their voir dire, and being accepted by the attorneys of both parties, were duly sworn as jurors to try said cause, viz: Thomas J. Shelton, Mathew McKelly, Silas McGuire, Frank H. Bruner, Benj. F. Butler, Theodore Lytle, Frank M. Clark, Smith Dixon, James Wright, Jos. F. Nounnan, Hiram Kimball, and G. C. Alexander.

119 SATURDAY, *Oct. 29th*, 1870.

Jury called, and all present. The following witnesses were sworn and examined on behalf of pl't'ffs: Christian Rehmke, Paul Engelbrecht, Claude Clive, Frederick Lutz, and Thomas Burke. The entire day being consumed in the examination of the said witnesses, court adjourned until 10 a. m. Monday, Oct. 31st, 1870.

WEDNESDAY, *Nov. 2d*, 1870.

The following witnesses were sworn and examined on behalf of plaintiffs: Johnny Young, Andrew Burt, Leonard J. Hykes, Benjamin F. Snyder, Sam'l Schoen, C. Rehmke, (recalled,) and Geo. R. Maxwell. Pl't'ffs rest.

On motion, it is hereby ordered by the court that a non-suit be, and is hereby, granted as to the defendants John Y. Smith, John Needham, John Smith, and William Ashman.

Def'ts' counsel thereupon moved for the discharge of Jeter Clinton. Motion denied; to which defendants, by their counsel, except.

Jury addressed by A. Miner, esq.

Recess.

2 p. m.—Resumed.

Witnesses sworn and examined on behalf of defendants: James Little, John Lollin, Robert Campbell, (def'ts file in evidence the application of Paul Engelbrecht, dated Aug. 4th, 1870, for a license,) Herrick,
120 James Benson, Cha's B. Trowbridge, W'm Naylor, Henry Dinwoody, Samuel S. Walker and Brigham Y. Hampton.

THURSDAY, *Nov. 3d*, 1870.

The following witnesses were sworn and examined on behalf of defendants: James E. Lyon, John W. Sharp, (the latter withdrawn by def'ts, and cross-examined by pl't'ffs' attorney,) Charles L. Donaldson, and Jeter Clinton. Defendants' counsel offer to introduce in evidence,

copy of an ordinance of the city of Salt Lake, passed by the city council thereof, Oct. 27th, 1866, to which pl't'ffs' counsel object on the ground that said ordinance is invalid on its face, and that at present has not been published. Objection overruled, and copy of ordinance, marked Def'ts' Exhibit "B," filed in evidence.

Def'ts' counsel offer to introduce in evidence the commission of Jeter Clinton as alderman and ex-officio justice of the peace, dated April 8th, 1870. (Objected to by pl't'ffs' attorneys, because the seal of the Territory is alleged to have been affixed thereto prior to Sec'y Vaughan's qualifying. Objection overruled, and said commission admitted, marked Def'ts' Exhibit "C.")

Defendants' counsel offer in evidence the warrant issued by Jeter Clinton. (Objected to by plaintiffs' counsel, on the ground of having been tampered with. Objection overruled and said document admitted, marked Def'ts' Exhibit "D.")

121 Brigham Y. Hampton recalled by defendants. Andrew Burt sworn and examined on behalf of defendants.

Defendants rest.

P. Engelbrecht & Christian Rehmke recalled and examined by pl't'ffs.

Recess.

2 p. m.—Resumed.

Plaintiffs offer in evidence a copy of the warrant issued by Jeter Clinton. Admitted, and marked Pl't'ffs' Exhibit No. 1.

The testimony being closed the court allowed each party two hours in which to sum up the case to the jury; whereupon Geo. R. Maxwell addressed the jury on behalf of pl't'ffs, followed by A. Miner and Z. Snow, on behalf of defendants.

At 5½ p. m. court took a recess until 7 p. m.

7 p. m.—Resumed.

R. N. Baskin addressed the jury on behalf of plaintiffs. Upon the conclusion of his remarks the court duly charged the jury, who retired to their deliberations in charge of D. R. Firman, a sworn bailiff of this court.

FRIDAY, *Nov. 4th*, 1870.

122 The jury in this case coming into court, and asking additional instructions, received the same from the court, and again retired to their deliberations. After being absent for some time, the jury again appeared in court, and, through their foreman, returned the following verdict:

In the 3rd district court of Utah Terr'y.

PAUL ENGELBRECHT, CHRISTIAN REHMKE, and Frederick Lutz, plaintiffs,
vs.
JETER CLINTON ET ALS., DEFENDANTS.

We, the jury in the above case, find the defendants, Jeter Clinton, John D. T. McAllister, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William Phillips, William Hyde, Charles Livingston, Charles Crow, John Reading, James Toms, Alexander Burt, Foster Curtis, David W. Leaker, Joseph McRae, John W. Sharp, McKennon, Thomas Burchell, and R. Smith guilty as charged in the complaint, and we further find for the plaintiffs in the sum of fifty-nine thousand and sixty-three & $\frac{25}{100}$ dollars, the same being three times the value agreed

upon by us of the goods of plaintiffs so destroyed by the said defendants.

(Signed) G. C. ALEXANDER, *Foreman.*

123 SATURDAY, *Nov. 12th*, 1870.

Bonds.

MONDAY, *Nov. 14th*, 1870.

Pl't'ffs allowed to serve amendments, and asks judgment to be entered.

Statement agreed to by pl't'ffs, and submitted on motion for new trial.

Recess to 3 p. m.

3 p. m.—Resumed.

Motion for new trial overruled; to which defendants, by their counsel, except. Ordered that judgment be entered.

124 On the 28th day of October, A. D. 1870, the above parties respectively came by their respective attorn*ies*, & said case was called for trial in its own proper order. Whereupon the following persons, to wit: Issac Sisson, W'm G. Higley, Thomas J. Shelton, Frank M. Clarke, Hiram Rice, Thomas A. Brown, John Cunnington, Levi Garrett, Cha's Popper, Heber P. Kimball, Charles Chrisman, & James M. Allen were duly called to serve as jurors in the trial of said case.

Whereupon said defendants, before said jurors were sworn by their counsel, interposed a challenge to the array, to which said plaintiffs demurred; & the court having heard the arguments of the respective counsel of said parties, upon consideration of the premises, sustained said demurrer. Whereupon said jurors were, by said parties, respectively examined on their voir dire, as to their competency to serve as jurors in said case, and after both the plaintiffs & defendants had each challenged several jurors for cause, and each had exhausted their peremptory challenges, the following jury, to wit: Thomas J. Shelton, Frank H. Bruner, Frank M. Clarke, Joseph F. Nounnan, Mat-
125 thew McKelly, Benjamin F. Butler, Smith Dixon, Hiram Kimball, Silas McGuire, Theodore Lytle, James Wright, and G. C. Alexander were duly empannelled & sworn to try said cause; and after hearing the evidence of said plaintiffs; on motion, it is hereby

Ordered by the court that a non-suit be, and the same is hereby, granted as to the defendants John Y. Smith, John Needham, John Smith, & William Ashman.

Whereupon, after further hearing the evidence of the defendants, the arguments of the respective counsel, and the charge of the court, said jury retired to their room for deliberation, in charge of the proper officer; & on the fourth day of November, A. D. 1870, returned the following verdict, to wit:

"In the third district court of Utah Terr'y.

"PAUL ENGE'BRECHT, CHRISTIAN REHMKE AND
"Frederick Lutz, pl't'ffs,
"*vs.*
"JETER CLINTON ET ALS., DEF'D'TS.

"We, the jury in the above case, find the defendants Jeter Clinton, J. D. T. McAllister, Andrew Burt, Brigham Y. Hampton, Charles Ring-

wood, William Phillips, William Hyde, Charles Livingston, C. Crow, John Reading, James Toms, Alexander Burt, Foster
126 tis, David W. Leaker, Joseph McRae, John W. Sharp, P. A. Kernion, Thomas Birchall, and R. Smith, guilty as charged in the complaint.

"And we further find for the plaintiffs in the sum of fifty-nine thousand and sixty-three $\frac{25}{100}$ dollars, the same being three times the value agreed upon by us, of the goods of plaintiffs so destroyed by the said defendants.

"G. C. ALEXANDER, *Foreman.*"

Whereupon said defendants gave notice of a motion for a new trial, which, on the 14th day of November, A. D. 1870, was filed and overruled. Whereupon said defendants moved an arrest of judgment, which was refused. Whereupon, on the said 14th day of November, A. D. 1870, the court having fully considered the proceedings & verdict heretofore rendered in said case, in consideration thereof, it is hereby ordered and adjudged by the court that said plaintiffs have and recover of and from the said defendants mentioned in said verdict, the sum of fifty-nine thousand and sixty-three dollars and twenty-five cents, so as aforesaid found and assessed by the jury in said case; also the costs of the plaintiffs in this behalf, taxed at $

Done in open court this 14th day of November, A. D. 1870.

127 Afterwards, on the 5th day of January, A. D. 1871, came the defendants, by their attorneys, Snow & Hoge, & filed in the office of the clerk of this court, a notice of appeal; which notice is in the words & figures following, to wit:

TERRITORY OF UTAH:

Third judicial district court, regular September term, 1870. Hon. J. B. McKean, judge.

PAUL ENGELBRECHT ET AL.
vs.
JETER CLINTON ET AL.

The plaintiff herein & their counsel will take notice that the defendants herein appeal to the Supreme Court from the decision of this honorable court overruling their motion for a new trial, entered on the 14th day of November, 1870.

December 31, 1870.

(Signed) SNOW & HOGE,
A. MINER & H. STOUT,
Att'ys for the Defendants."

And afterwards, on the same day, the plaintiffs, by their attorney, R. N. Baskin, acknowledged service of the above notice, which acknowledgement is in the words & figures following, endorsed on said notice, to wit:

"We acknowledge service of this notice.

"Jan. 5, 1871.

(Signed) "R. N. BASKIN,
"*Att'y for Plaintiff.*"

128 Afterward, on the 6th day of January, A. D. 1871, came the defendants, by their attorneys, Snow & Hoge, and deposited

with the clerk of this court the sum of one hundred dollars on behalf of the appellants, to abide the event of the appeal in this case.

129 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, William S. Walker, clerk of the district court for the third judicial district of the Territory, do hereby certify that the within & foregoing is a full, true, & copy, complaint, affidavit for order of arrest, order of arrest, undertaking on arrest, answer of Jeter Clinton et al., answer of Andrew Burt et al., answer of John D. T. McAllister, demurrer to answer of Andrew Burt et al., demurrer to answer of John D. T. McAllister, defendants' challenge to the array of petit jurors, notice of motion for a new trial, motion to vacate verdict, motion for arrest of judgment, bond of P. Engelbrecht, license No. 776, affidavit of W'm G. Phillips, Salt Lake City ordinance, passed Oct. 27, 1866, warrant to J. D. T. McAllister, petition of Paul Engelbrecht, certificate of Jeter Clinton's election, statement, record of court, verdict, judgment, notice of appeal & payment of fees, on file and of record in my office in the case of P. Engelbrecht et al. vs. Jeter Clinton et al.

U. S. AM'A, 3D DIST. COURT, TERR'Y OF UTAH. } Witness my hand & the seal of said court at Salt Lake City, this 12th day of January, 1871.
W'M S. WALKER, *Clerk.*

130 (Indorsed:) P. Engelbrecht et al. vs. Jeter Clinton et al. Transcript. Filed Jan. 12, 1871. C. Myron Hawley, clerk.

131 Afterward, to wit, on the 2d day of March, A. D. 1871, came the said appellants, by their said attorneys, and filed in the office of the clerk of this court a further transcript in said case, duly authenticated, appealing from the final judgment of the said district court to this court, rendered in said case; which said last-mentioned transcript contained the complaint of the appellees against the appellants filed in the said district court in this case, the affidavit for the arrest, the order for the arrest, the undertaking filed by the appellants, the several answers of the appellants to the complaint of the appellees, the several demurrers of the appellees to the several answers of the appellants, and the record and proceedings of the district court, and each and every of them in the same identical words and figures as the same
132 are contained in the transcript filed on the 12th day of January, A. D. 1871, hereinbefore truly copied, and in addition thereto the following words and figures, viz:

133 And afterwards, to wit, on the 13th day of February, A. D. 1871, the defendants, by their attorneys, Snow and Hoge, filed in the clerk's office of this court a notice of appeal from the foregoing judgment; which notice is in the words & figures following, to wit:

134 TERRITORY OF UTAH:

Third judicial district court. Hon. J. B. McKean, judge.

PAUL ENGELBRECHT ET AL.
vs.
JETER CLINTON ET AL.

To the plaintiffs herein:

You will take notice that the defendants herein hereby appeal to the

supreme court of the Territory of Utah from this final judgment of this court rendered in the above-entitled case on the 14th day of November, 1870, against them, and in favor of the plaintiffs, for the sum of fifty-nine thousand & sixty-three $\frac{25}{100}$ dollars, and costs, and from each and every part thereof.

(Signed) SNOW & HOGE,
Attorneys for Def'dts.

FEBRUARY 13TH, 1871.

Which said notice of appeal is endorsed as follows:

"We accept service of this notice. February 13th, 1871.

(Signed) "R. N. BASKIN,
"*One of the Attorneys for Plaintiffs.*"

135 Afterwards, on the following day, the defendants filed in the clerk's office of this court an appeal bond; which bond is in words and figures following, to wit:

136 *Appeal bond.*

TERRITORY OF UTAH,
Salt Lake County:

Third judicial district court, Hon. J. B. McKean, judge.

PAUL ENGELBRECHT, CHRISTIAN REHMKE, Frederick Lutz,
vs.
JETER CLINTON, JOHN D. T. MCALLISTER, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William Hyde, Charles Livingston, Charles Crow, John Reading, James Toms, Alexander Burt, Foster Curtis, John W. Sharp, David W. Leaker, Joseph McRae, P. McKennon, Thomas Birchall, R. Smith.

Whereas the defendants in the above-entitled action have appealed to the supreme court of the Territory of Utah from a judgment made and entered against them in said action on the 14th day of November, 1870, for the sum of fifty-nine thousand sixty-three $\frac{25}{100}$ dollars damages and costs of suit:

137 Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, John Sharp, contractor; Edward D. Woolley, county recorder for Salt Lak' County; Joseph *Haven*, a farmer; J. C. Little, wagon manufacturer; Frederick Kesler, a farmer; Peter Nebecker, farmer; L. W. Hardy, farmer and lumber merchant; Edward Hunter, farmer; H. B. Clawson, general superintendant of Zion's Mercantile Co-operative Institution; William Clayton, territorial auditor, residents of the county of Salt Lake and Territory of Utah, do hereby, jointly and severally, undertake and promise, on the part of the appellants, that the said appellants will pay all damages and costs which may be awarded against them on the appeal, not exceeding one hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellants being desirous of staying the execution

of the said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally, undertake and promise, and do further acknowledge ourselves, jointly and severally, bound
138 in the further sum of one hundred and twenty thousand dollars, being double the amount of said judgment, that if the said judgment appealed from, or any part thereof be affirmed, the appellants shall pay the plaintiffs the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellants on the appeal.

JOHN SHARP.
EDWIN P. WOOLLEY.
JOSEPH HORNE.
J. C. LITTLE.
FREDERICK KESLER.
PETER NEBECKER.
L. W. HARDY.
EDWARD HUNTER.
H. B. CLAWSON.
WILLIAM CLAYTON.

Witness:
ISAAC GROO.
FREDERICK KESLER.
S. W. RICHARDS.

139 TERRITORY OF UTAH,
Salt Lake County:

John Sharp, being first duly sworn according to law, says that he has subscribed his name to the foregoing undertaking as surety, and that he is worth the sum of thirty thousand dollars over and above all just debts and liabilities, exclusive of the property exempt from execution. And further says not.

(Signed) JOHN SHARP.

Subscribed and sworn to before me this 11th day of February, A. D. 1871.

(Signed) W'M S. WALKER, *Clerk.*

TERRITORY OF UTAH,
Salt Lake County:

Edwin D. Wooley, whose name is subscribed to the annexed undertaking as surety, being duly sworn, deposes and says that he is worth the sum of ten thousand dollars over and above all just debts and liabilities, exclusive of the property exempt from execution. And further says not.

(Signed) EDWIN D. WOOLEY.

Subscribed and sworn to before me this 9th day of February, A. D. 1871.

(Signed) W'M S. WALKER, *Clerk.*

140 TERRITORY OF UTAH,
Salt Lake County:

Joseph Horne, whose name is subscribed to the annexed undertaking as surety, being duly sworn, deposes and says that he is worth the sum

of six thousand dollars over and above all just debts and liabilities, exclusive of the property exempt from execution. And further says not.

(Signed) JOSEPH HORNE.

Subscribed and sworn to before me this 9th day of February, A. D. 1871.

(Signed) W'M S. WALKER, *Clerk.*

TERRITORY OF UTAH,
Salt Lake County:

J. C. Little, whose name is subscribed to the annexed undertaking as surety, being duly sworn, deposes and says that he is worth the sum of fifteen thousand dollars over and above all just debts and liabilties, exclusive of the property exempt from execution. And further says not.

(Signed) J. C. LITTLE.

Subscribed and sworn to before me this 9th day of February, A. D. 1871.

(Signed) W'M S. WALKER, *Clerk.*

141 TERRITORY OF UTAH,
Salt Lake County:

Frederick Kesler, whose name is subscribed to the foregoing undertaking as surety, being duly sworn, deposes and says that he is worth the sum of ten thousand dollars over and above all just debts and liabilities, exclusive of the property exempt from execution. And further says not.

(Signed) F. KESLER.

Subscribed and sworn to before me this 13th day of February, A. D. 1871.

(Signed) W'M S. WALKER, *Clerk.*

TERRITORY OF UTAH,
Salt Lake County:

Peter Nebecker, whose name is subscribed to the annexed undertaking as surety, deposes and says, being duly sworn, that he is worth the sum of ten thousand dollars over and above all just debts and liabilities, exclusive of the property exempt from execution. And further says not.

(Signed) PETER NEBECKER.

Subscribed and sworn to before me this 11th day of February, A. D. 1871.

(Signed) W'M S. WALKER, *Clerk.*

142 TERRITORY OF UTAH,
Salt Lake County:

L. M. Hardy, whose name is subscribed to the annexed undertaking, as surety, being duly sworn, deposes and says that he is worth the sum of ten thousand dollars over and above all just debts and liabilities, exclusive of the property exempt from execution. And further says not.

(Signed) L. W. HARDY.

Subscribed and sworn to before me this 11th day of February, A. D. 1871.

(Signed) WM S. WALKER, *Clerk.*

TERRITORY OF UTAH,
Salt Lake County:

Edwin Hunter, who subscribed his name to the annexed undertaking as surety, being duly sworn, deposes and says that he is worth dollars over and above all just debts and liabilities, exclusive of the property exempt from execution. And further says not.

143 TERRITORY OF UTAH,
Salt Lake County:

H. B. Clawson, who subscribed his name to the annexed undertaking as surety, being duly sworn, deposes and says that he is worth the sum of twenty thousand dollars, over and above all just debts and liabilities, exclusive of the property exempt from execution. And further says not.

(Signed) H. B. CLAWSON.

Subscribed and sworn to before me this 11th day of February, A. D. 1871.

(Signed) WM S. WALKER, *Clerk.*

TERRITORY OF UTAH,
Salt Lake County:

William Clayton, who subscribed his name to the annexed undertaking as surety, being duly sworn, deposes and says that he is worth the sum of five thousand dollars over and above all just debts and liabilities, exclusive of the property exempt from execution. And further says not.

(Signed) WILLIAM CLAYTON.

Subscribed and sworn to before me, this 11th day of February, A. D. 1871.

WM S. WALKER, *Clerk.*

144 Which said appeal bond is endorsed as follows, to wit:

"I hereby accept the sufficiency of said sureties, but reserve all exceptions as to the form & substance of said bond or undertaking.

(Signed) "R. N. BASKIN,
"*Of Counsel for Plaintiffs.*

"FEB. 14, 1871."

145 (Let the pleadings be added.)

Sheet 1, page 1.

TERRITORY OF UTAH:

Third judicial district court. Regular September term, 1870. Hon J. B. McKean, judge.

PAUL ENGELBRECHT ET AL.
vs.
JETER CLINTON ET AL.

Statement prepared pursuant to the act entitled An act to regulate proceedings in civil cases in courts of justice in this Territory, and to repeal certain acts and parts of acts, approved Feb. 17, 1870, to be used on an appeal from the final judgment rendered in this case.

1st exception.

On the 9th day of August, 1870, the Hon. O. F. Strickland, then the judge of this district court, made an order, which was by him duly signed and dated, and which, in other respects was as follows, viz:

TERRITORY OF UTAH,
Third Judicial District Court.

Hon. O. F. Strickland, judge:

Being reliably advised that the ends of justice will be materially promoted by so doing, it is ordered that the grand and petit jurors be drawn for the ensuing term of said court as follows: Five grand and five petit jurors from each of the counties of Salt Lake and Davis, and four grand and four

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petit jurors from each of the counties of Tooele and Weber.

Pursuant to the above order, a venire was issued, but not served nor returned.

On the 18th day of August, 1870, the Honorable O. F. Strickland, then judge, as aforesaid, made another order, duly signed, dated, and entitled, which in other respects was as follows:

"On the application of Charles H. Hempstead, U. S. attorney, and pursuant to the provisions of law, it is ordered that you issue to the U. S. marshall a venire, commanding him to summon from the body of said district twenty-three good and lawful men to act as grand jurors, and eighteen good and lawful men to act as petit jurors at the ensuing term of said court, and that the same be made returnable on the second Monday, to wit: the 12th day of September, A. D. 1870, the first day of said term of said court. And hereof fail not."

That pursuant to this last-mentioned order, a venire was issued, served, and returned, with a panel of petit jurors of eighteen annexed. But the jurors thus summoned were not selected by the county courts of the counties of the third judicial district, nor by any of them, as provided by the act of Utah, nor were they or any of them drawn from the jury-box by the United States marshall

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and the clerks of said county courts, nor by any

of them. On the contrary, they were summoned by the U. S. marshal, promiscuously, from the body of the district.

When this case was called for trial, and twelve jurors of the panel last aforesaid were placed in the jury-box, the defendants, by their counsel, filed a challenge to the array, which was duly entitled in this case, and signed by counsel, and which, in other respects, was as follows:

"Now come the defendants in the above-entitled case, and before the empanneling and swearing the jury herein, challenge the array of the traverse jurors herein returned, for the following reasons, viz:

"1. That the jurors herein returned were summoned by M. T. Patrick, U. S. marshall for Utah Territory, and not by the territorial marshall of said Territory, John D. T. McAllister, territorial marshall of said Territory, as by the laws of said Territory required.

"2. That the jurors were summoned promiscuously from the body of the third judicial district of said Territory, and not five jurors from each of the counties of Salt Lake and Davis, and four jurors from each of the counties of Tooele and Weber, pursuant to the order of the Hon. O. F. Strickland, late judge of said third judicial district, entered of record on the 9th day of August, 1870.

"3. The said jurors were not selected by the county court clerks of said counties, nor by any of

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them, and the territorial or U. S. marshall as by law required, to wit, by the act of the governor and legislative assembly of Utah Territory, entitled An act defining who are exempt from serving on juries, and prescribing the mode of procuring grand and petit jurors and juries for district courts, and for other purposes, approved Jan. 21st, 1859, and the act amendatory thereto.

"4. That said jurors were not selected, drawn, chosen, called, and summoned pursuant to the laws of Utah Territory in such case made and provided."

To this challenge the plaintiffs demurred, which demurrer the court sustained, and ordered the trial to proceed. To the sustaining of the demurrer and ordering the trial to proceed, the defendants then and there excepted.

149 *2' exception.*

In empannelling a jury, the places of such as were rejected for cause were filled by talesmen; and after the counsel for the respective parties had exercised their right to challenge for cause, and before any peremptory challenges had been made, each of the defendants, by his counsel, claimed the right and demanded the exercise thereof, to challenge six

jurors peremptorily. The plaintiffs' counsel objected, and the court held that all the defendants together could interpose six peremptory challenges only. The defendants' counsel then and there excepted to this ruling.

The counsel for the respective parties then alternately challenged jurors peremptorily until each side had thus caused the rejection of six, whose places were filled by talesmen as fast as they were rejected. The twelve men thus secured were sworn as the jury.

150 Sheet 2, page 1.

Statement of the evidence and proceedings before the jury on the trial.

1.

1. On the trial the defendants, against
2. whom the verdict was brought and
3. judgment was rendered, with the exception
4. of Jeter Clinton, did not controvert the
5. fact of the destruction of the goods
6. at the time and place mentioned in the
7. complaint in the answer of
8. John D. T. McAllister; nor did they
9. deny but that each of them was
10. present and assisted in their destruction,
11. as their answers showed; and the
12. evidence on the trial showed that they
13. did assist in the destruction of the said goods.

2.

14. Jeter Clinton, John Needham, William
15. Ashman, and John Y. Smith did controvert
16. all the allegations in the complaint,
17. but when the testimony on the part of the
18. plaintiffs was closed, there being no evidence
19. against John Needham, William
20. Ashman, and John Y. Smith, they, on
21. motion of their counsel, were, by consent
22. of plaintiffs, discharged.

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Exception 3.

1. These defendants did controvert—
2. 1. The partnerships of the plaintiffs,
3. and their alleged ownerships of the
4. goods; and
5. 2. The quantity, quality, and separate
6. and aggregate value of the goods
7. injured and destroyed as alleged
8. in the complaint.

4.

Jeter Clinton, at the close of the plaintiffs' testimony, moved the court to be discharged; which motion the court overruled, and he then and there excepted.

Testimony as it stood when the plaintiffs rested their case, as to Jeter Clinton.

All the witnesses concurred in their testimony that Jeter Clinton was not there at the time the goods were destroyed, and that he did not take any part therein; but the plaintiff C. Rehmke testified that, on the 27th day of August, 1870, between 7 and 8 o'clock in the morning, Mr. John D. T. McAllister, the city marshal, with some twenty or thirty other persons, some of

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whose names he did not know, came to their store; that McAllister read to him a warrant, and then they proceeded and destroyed the goods.

Rehmke said that he, after the goods were destroyed, on the same day went with Mr. Baskin to the city hall, and there saw Alderman Clinton, and heard Mr. Baskin ask him if he authorized the destruction of those goods, to which he replied, "Mr. Baskin, I have always treated you like a gentleman, and I want you to treat me the same; do you think that property could have been destroyed without authority?" He said he did authorize it, and gave Mr. Baskin a copy of the warrant.

Page 4.

153 Sheet 3, page 1.

Exception 4.

The plaintiff Christian Rehmke was placed upon the stand as a witness, who, on being sworn, and having the complaint, to assist his memory, placed in his hands by the counsel for the plaintiffs, testified and said the bill of items therein is in my handwriting. He said that those were the goods destroyed, & stated what he understood to be their value. After testifying concerning the items, on his cross-

examination, he said that, on the 1st day of August, 1870, he and the other two plaintiffs entered into partnership, and they then made an inventory of these goods. Afterwards, from August 1st, to August 27th, they had sold liquors at retail, but none at wholesale, and they had, by a clerk, kept an account of their sales. It was from the invoices and this account of sales that he had made out the account of items in the complaint contained.

At this point the defendants, by their counsel, prayed the court for an order for the plaintiffs to produce these invoices and this account of sales, as containing the best evidence of their contents; which order the court refused, and the defendants then and there excepted.

The following is the testimony relating to the exceptions taken to the charge of the court to the jury.

154 Sheet 1, page 1, of the testimony, &c.

The plaintiff, Behmke, further testified that no application had been made by the firm in their firm-name to any one for the payment of a special tax as liquor-dealers, or for a license to sell liquors after the partnership was formed; that the prices by him given were their retail prices; and that the articles mentioned in the complaint following the words therein "on storage in cellar," were not the property of the plaintiffs, but a portion of them belonged to himself, and another portion to a man by the name of Wagner.

The plaintiff, Engelbrecht, testified that he made application to the city council for a license in the early part of August, but what day he did not remember, nor whether it was in his own name or the firm-name, nor whether it was for a wholesale or a retail license, and that it was granted him. Afterwards Mr. Burt, one of the defendants, being the chief of police, offered him the license if he would pay for it, and give the bond; that he offered to pay for the license, but refused to give the bond; that Mr. Burt refused to receive the money and to deliver the license without the bond, but said he would see him again, but did not.

Both of the foregoing witnesses testified, on their cross-examination, that they had been

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selling liquors at retail, but not at wholesale, from the 1st to the 27th day of August, the day of the destruction, without a license

from the city council for so doing.
The plaintiff, Engelbrecht, further testified
that the prices of the goods mentioned in the
complaint were their own retail prices; that
he did not know what others sold them at, and
that the goods mentioned in the complaint
following the words "on storage in cellar,"
were not the property of the plaintiffs, but
some were the property of Rehmke, and the
residue of a man by the name of Wagner.

The plaintiffs testified that they had no notice of the proceedings in question, before Alderman Clinton, prior to the issuing of the warrant.

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On the part of the defendants the ordinance
of the city council and the warrant hereto
attached, one marked Exhibit "A," and the
other Exhibit "B," was introduced and
received in evidence, and with them Mr.
Robert Campbell, the city recorder, and
the defendants, "Jeter Clinton," Andrew Burt,
and John W. Sharp, as witnesses.
Mr. Campbell testified that it was his
duty, as city recorder, to issue license when
granted by the city council; that Mr.
Engelbrecht applied to the city council
in August, for a license to sell liquors at his
store at wholesale—(here he presented the
petition, which was dated August 4th, 1870,
signed Paul Engelbrecht, praying for
a license to sell liquors by wholesale
at the place where the liquor was destroyed;
this was also received in evidence;)
that the license was granted by the
city council and by him issued and
delivered to Andrew Burt, the chief of
police, and which was afterward
returned to his office.

157 Page 4.

Jeter Clinton, one of the defendants, testified that he issued
the warrant about 7 o'clock a. m., Aug. 27, 1870, in its present
form, and delivered the same to the city marshall, J. D.
T. McAllister, to execute; that the endorsement
on the back of the said warrant was made
by McAllister in his presence, and that the
warrant had not been changed in a single
word, since its return to his office.
The plaintiffs then made the said witness
their own, when he testified that he acted as
he understood the law, that was when the
affidavit required by the ordinance was
made before him; that it was his duty to
investigate the matters therein charged, and if

found to his satisfaction to be true, to issue his warrant; that in this case he had called witnesses, and made an investigation of the matter, and was satisfied the charges were true; he then issued the warrant; that none of the parties sued had been told of the making of the affidavit or issuing of the warrant by him, except the marshal, whom he had spoken to the night previous, and told him that he, Clinton, should want him the next morning to execute a warrant.

He also testified that Paul Engelbrecht was brought before him on the 15th day of August, 1870, on three separate charges of selling liquors at retail without first obtaining a license from the city council for so doing; and that he had assessed

158 Sheet 2 of testimony, page 1.

a fine of one hundred dollars on each of said charges, neither of which had been appealed from, and that on the return of the warrant by the marshall, he having arrested the said Engelbrecht, and having him in court, a fine of $100 00 was assessed against the said Engelbrecht, which last said fine had not been appealed; he never knew, nor heard it intimated that Rehmke and Lutz were partners of Engelbrecht's until the summons in this case was served on him; that he was alderman of Salt Lake City. (He then presented his commission, duly issued by the governor of Utah Territory, marked Exhibit "C," which shows that he was elected on the 14th day of February, 1870, and duly qualified as one of the aldermen of said city; which commission was received as evidence.)

Andrew Burt was placed upon the stand as a witness for both parties—on the part of the plaintiffs, after informing them who were there and participated in the destruction of the goods, viz, all the defendants save Clinton, against whom the verdict herein was rendered—on his cross-examination said that all the persons named in the answer of himself and others were called upon by the city marshall and ordered by him to do what was done by them on that occasion.

159 Page 2, sheet 2.

On the part of the defendants he said that he tendered to Engelbrecht the license spoken of by him, and at the same time a bond for Engelbrecht to sign which he refused to do until he could consult

his attorney. On the next day he again called on Engelbrecht, when Engelbrecht told him that his counsel advised him not to sign the bond, which he then refused to do. He then declined to receive the money or deliver the license.

John W. Sharp, one of the defendants, testified that he was on his way from his home to work on the morning of the 27th of August. When passing the city hall he was called on by the city marshal to assist in executing the warrant, not more than ten minutes prior to the commencement of the destruction, and that he knew nothing of the matter before that time.

Sheet 2, page 3.

160 Sheet 3, page 1.

EXHIBIT "A."

Copy of ordinance

Relating to licenses for the manufacture and sale of spirit'ous, vinous, and fermented liquors.

SEC. 1. Be it ordained by the city council of Great Salt Lake City that it shall not be lawful for any person or persons to manufacture, sell, or otherwise dispose of any spirit'ous, vinous, or fermented liquors, nor to establish or keep or to assist in keeping or conducting any house or place for the purpose of manufacturing or selling or otherwise disposing of any spirit'ous, vinous, or fermented liquors within the limits of this city, without first obtaining license from the city council for such purpose.

SEC. 2. That a wholesale liquor-license shall not authorize any person to sell, barter, or deliver any wines, spirit'ous, or fermented liquors in less quantities than ten gallons, or in original packages, and bottled liquors or wines only in original packages as imported, and in no case to be drunk on the premises of the parties so licensed.

SEC. 3. That a retail liquor-license shall not authorize the sale of wines or spirit'ous liquors in a greater quantity

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than three gallons, & in no case to be drank on the premises.

SEC. 4. That a license to keep a bar, drinking-saloon, or dram-shop shall not authorize any person to sell, barter, or

deliver, or suffer or permit to be sold, bartered, or delivered any spirit'ous, vinous, or fermented liquors, or any composition of which wines or spirit'ous liquors form a part, in any quantity, except to be drank on the premises of the parties so licensed.

SEC. 5. That all persons so licensed as set forth in the preceeding section shall institute such regulations in their houses as shall restrain drunkenness, riotous or disorderly conduct, and shall keep a cleanly, well-regulated establishment, which shall not be opened for the sale of liquors between the hours of eleven o'clock at night and four o'clock in the morning, and the police shall have access to the premises at all hours.

SEC. 6. It shall not be lawful for any person to sell or dispose of any spirit'ous, vinous, or fermented liquors to any person under sixteen years of age, or to any Indian nor to sell or otherwise dispose of any liquors on the Sabbath day.

SEC. 7. Any person having reasonable

cause to believe that any house or place mentioned in the foregoing section of this ordinance, is established and kept for the purpose of manufacturing, selling, or otherwise disposing of spirit'ous, vinous, or fermented liquors, without first obtaining license from the city council, and will make oath of the same, describing the place, and if upon investigation, it shall so appear, the mayor or alderman, before whom such complaint has been made, may issue his warrant, directed to the city marshal, or any of his deputies, commanding him to enter such house or place, and demolish all things found therein, made use of for the purpose of manufacturing, selling, or otherwise disposing of spirit'ous, vinous, or fermented liquors, and to arrest the person or persons owning, keeping, or conducting said house or place, and bring him or them before the court, and such person or persons, on conviction, shall be liable to a fine not to exceed one hundred dollars, and to imprisonment, not to exceed six months, or both fine and imprisonment, at the discretion of the court.

SEC. 8. The city council on granting license to any person or persons for the manufacture or sale of spirit'ous, vinous, or fermented liquors

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shall determine the time for which it shall be given, and the amount to be paid thereon, and shall require bonds, with security, & determine the amount thereof for the due observance of the ordinances and regulations of the city. Said bonds shall be approved by the mayor or city council and filed with the recorder.

SEC. 9. Any person violating any of the provisions of this ordinance shall be liable to a fine, in any sum not exceeding one hundred dollars, and forfeiture of license.

SEC. 10. All ordinances and parts of ordinances relating to the manufacture & sale of spirit'ous, vinous, and fermented liquors, heretofore passed by the city council, are hereby repealed.

Passed October 27th, 1866.

DANIEL H. WELLS, *Mayor.*

ROBERT CAMPBELL,
City Recorder.

TERRITORY OF UTAH,
Salt Lake City, ss:

This certifies that the foregoing is a true copy of the ordinance passed by the city council, Oct. 27th, 1866.

Given under my hand and the corporate seal of Salt Lake City this 23rd day of May, A. D. 1870.

[SEAL.]

ROBERT CAMPBELL,
City Recorder.

164 Sheet 4, page 1.

EXHIBIT "B."—*Copy of warrant.*

TERRITORY OF UTAH,
Salt Lake County, ss:

THE PEOPLE OF SALT LAKE CITY
vs.
PAUL ENGELBRECHT.

To John D. T. McAllister, city marshal of Salt Lake City, or any of his deputies, to whom these presents shall come, greeting:

Whereas, on this 27th day of August, 1870, before me, Jeter Clinton, one of the aldermen of the city of Salt Lake, in the county and Territory aforesaid, personally appeared one William G. Phillips, who was by me sworn in due form of law, & who on his oath did say, among other things, that one Paul Engelbrecht is the owner and keeper of a building, situate on Second South street, between East Temple and First East street, in said city, known as the Merchants' Exchange; and therein he, the said Paul Engelbrecht, has a large quantity of spiritous and vinous liquors, as he firmly believed, which said liquors, as the affiant firmly believed, *is* established and kept therein by the said Paul Engelbrecht for the purpose, among

other things, of unlawfully selling and disposing of the same ... first obtaining a license from the city council for so doing:

And I having investigated the said charge, and satisfied the same is true in fact, you are hereby commanded to forthwith, after these presents shall come to your possession, *to* enter said building & seize & demolish all things by you found therein which *is* made use of for the purpose of unlawfully selling or otherwise disposing of spirit'ous or vinous liquors, & that you arrest the said Paul Engelbrecht, & forthwith bring him before me, to be dealt with as the law provides.

Given under my hand, this 27th day of August, 1870.

JETER CLINTON,
Alderman of said City.

(Indorsed:)

Def'ts' Exhibit "D." Salt Lake City vs. Paul Engelbrecht. Warrant.

I hereby return this writ, having duly served the same by demolishing all the liquors found in the within-named house, & having the within-named Paul Engelbrecht now in custody.

JOHN D. T. McALLISTER,
City Marshal.

S. L. CITY, *Aug. 29th*, 1870.

166 Sheet 1, page 1, of errors in law.

1. After the testimony was closed, each
2. of the parties presented to the court
3. prayers for instruction to the jury, which
4. were in writing. Those on the part of the
5. defendants were regularly numbered
6. from 1 to 19, among which were
7. the following, as numbered by them:

8. No. 3.

9. Before the jury can bring in a verdict of guilty
10. against the defendants or against any of them, they
11. must be satisfied from the evidence that the destruc-
12. tion of the goods was not only unlawful, but
13. that they were wilfully and maliciously
14. destroyed, & that the defendants knew, or at
15. least verily believed, it was unlawful, & then
16. they wilfully and maliciously destroyed
17. them.

4.

18. If, on the other hand, the jury believe from the
19. evidence that the defendants, or any of them,
20. believed it was their right & duty to destroy
21. the goods and acted under such belief,
22. then, though they or some of them might have
23. had malice in their hearts and acted

24. wilfully, still they are not guilty, and the
25. verdict must be for the defendants.

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5.

1. If the jury believe from the evidence there was
2. probable cause for the defendants, or any of
3. them, believing they had a right, & it was
4. their duty to destroy the goods, and that they
5. acted under such belief, then the jury
6. must find for such defendant or defendants,
7. as the case may be.

6.

8. That the plaintiffs having elected to bring
9. their suit against the defendants under the
10. statute & for a statute penalty, they are
11. now bound by that election, and they must
12. recover, if they recover at all, the penalty. They
13. cannot merely recover the value of the
14. goods.

7.

15. That the jury must be satisfied from the
16. evidence that all the goods alleged to
17. have been destroyed were destroyed, and
18. were of the separate and aggregate value
19. as alleged, or they must find for the defen-
20. dants.

15.

21. That though the proceedings had before
22. Alderman Clinton may not have been in
23. all respects technically legal, yet they
24. constituted a full and complete justi-

168 Page 3.

1. fication to this action for all of the
2. defendants.

16.

3. The court is requested to instruct the jury that
4. if from the evidence they believe the defendants
5. did not wilfully and maliciously
6. destroy the goods sued for, although the
7. destruction may have been unlawful, they
8. must find for the defendants.

17.

9. The court is requested to instruct the jury that

if they believe from the evidence that a portion of the goods destroyed and sued for were owned by Christian Rehmke, another portion by a man by the name of Wagner, and a third portion by the plaintiffs, they must find for the defendants.

18.

The court is requested to instruct the jury that if they believe from the evidence that any or all of the defendants named in the answer of Andrew Burt and others were acting under the orders of, & were called on by the city marshal, John D. T. McAllister, to assist him in the execution of the warrant issued by Jeter Clinton, as alderman of Salt Lake City, they must find for the defendant or defendants so acting.

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19.

Each of the instructions aforesaid the court refused to give as requested, and the defendants then and there excepted.

There were also the several following items in the defendants' request, and numbered

170 Sheet 2, page 1.

as hereinafter specified, each of which the court refused to give and to the refusal of giving the charges, the defendants then & there excepted.

8.

That if they believe from the evidence that Paul Engelbrecht, one of the plaintiffs, made application to the city council of Salt Lake City on the day of August, 1870., for a license to sell liquor at wholesale at the place where the liquor was destroyed, and then and there kept a sign over the door, in his own name, without disclosing the names of the partners that this was a fraud on the city; that, being such fraud the plaintiffs are stopped from setting up a joint or partnership interest in the goods.

9.

That if the jury believe from the evidence that the said Paul Engelbrecht, in the month of May, 1870, made application to the assessor of the United States in the district of Utah for the purpose of paying a special tax for selling liquor at wholesale at the place where the liquor was destroyed; that, afterwards, the plaintiffs, though they may have since purchased an interest in the goods, failed to make an application to the same authority for the payment of a special tax as a firm, they are stopped from setting up a joint or partnership interest in the goods.

171 Page 2.

12.

That if the jury believe from the evidence that Jeter Clinton, one of the defendants herein, on the 27th day of August, 1870, was an acting alderman of said city then they must find that he, as such alderman, had jurisdiction to take the affidavit and issue the warrant also described in said McAllister's answer.

13.

That, if they find from the evidence that, on the 27th day of August, 1870, one William G. Phillips appeared before Jeter Clinton, as such alderman, and made an affidavit as alleged, and that the said Clinton issued a warrant as alleged, then it constituted a lawful authority for destroying the goods, if, on examination, the goods were found on the premises.

14.

That, if the jury find from the evidence that there was an adjudication, commencing on the 27th day of August, & terminating on the 1st day of September, 1870, of the matter specified in the said affidavit, it not having been appealed from, is conclusive evidence of the matters therein stated.

19.

The defendants ask the court to instruct the jury that, if they find from the evidence that Christian Rehmke was present at the time of and witnessed the destruction

172 of the property commanded by the warrant which was directed against the property of Paul Engelbrecht, and did not inform the officer executing said warrant that he was the owner or joint owner thereof, he is stopped from claiming the penalty given by statute or the value of the property destroyed.

The court, among other things, charged the jury that the 7th section of the ordinance, introduced in evidence, was null & void, inasmuch as it provided for the destruction of property for alleged offence of its owner without giving such owner an opportunity first to be heard ;

That the warrant herein was issued in accordance with such section, & was void upon its face ;

That being thus void the warrant was no protection to the officer who issued it, nor to those who acted under it, so far as a demand for the value of the goods destroyed was concerned ;

That the jury might consider the warrant & all the evidence in the case, in considering the question whether the goods were wil'fully and maliciously destroyed ; and, if they found that there was no malice, then they might find a verdict for the plaintiffs, for the actual value of their joint property destroyed, and against such defendants only as they should find

173 Page 3.

ordered or aided in such destruction thereof.

That if they should find from the evidence that the plaintiffs' goods were willfully & maliciously destroyed, then they might find a verdict for the plaintiffs in three times the value of the goods so destroyed, but only against such of the defendants as they should find had ordered or aided in such destruction thereof.

To each and all of the above things, charged by the court, the defendants' counsel excepted.

After the jury had been in deliberation for ten hours without agreeing upon a verdict they came in & presented to the court the two following questions in writing :

1.

13. Does the unlawful entry into the building
14. in question, and the destruction of the
15. goods therein, carry with it constructive or
16. implied malice?

2.

17. Can the jury find a penal verdict against
18. one or more of the defendants and not against
19. the others?

174 The court, in further instructing the jury, read these questions, and said:

The destruction of the goods would imply malice, if the evidence stopped there; but it does not stop there. There is other evidence in the case. If the plaintiffs have failed to satisfy you that there was malice, or if the defendants have rebutted the presumption of malice, then you cannot find against the defendants for a penalty.

The court further instructed the jury that they could not find a partial verdict, such as one sum of money against some of the defendants & another sum against others; but that it must be for the same amount against all against whom they should find any verdict.

(Here insert a statement of the verdict, and a copy of the entry of judgment.)

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8. Afterward, on the 7th day of November, 1870,
9. the defendants gave notice of filing a motion
10. to the court for vacating the verdict and
11. granting a new trial; and on the 12th day
12. of November, being Saturday, filed, as provided
13. by the code, a statement for said motion,
14. and served the same, on the same day,
15. on the plaintiffs' counsel. Afterwards,
16. on Monday, the 14th day of November, the statement
17. was agreed to by the pl't'ff's' counsel, & the court
18.
19.
20.
21.
22.

being about ready to adjourn, late on the last day of a term that had continued in session eight weeks, the defendants' counsel requested further time to make a motion for a new trial & to prepare and deliver arguments thereon. The court decided to hear the motion then & there; it was made, was overruled pro forma, and the defendants' counsel excepted.

176 Sheet 3, page 1.

1. The defendants herein specifically
2. rely on the following errors, viz:

No. 1.

3. 1st. The complainant does not state facts
4. sufficient to authorize a judgment for the
5. statute penalty.
6. It is insufficient in this, viz:
7. 1st. This action is predicated upon an act
8. which, if committed, is a felony, and yet it
9. is not averred in the complaint, nor is there
10. any excuse for not averring, that the
11. defendants have been prosecuted for such
12. felony.

13. 2.

14. The complaint does not aver that
15. any malice existed in the minds of the
16. defendants, or in the minds of any of them,
17. against the plaintiffs, or against any of
18. them 3d.

19. The words unlawfully, wil'fully, and maliciously,
20. as used in the complaint, are not suffi-
21. ciently descriptive of a wil'ful and
22. malicious injury to property to authorize
23. a judgment thereon for a penalty.

4th.

24. The complaint is ambiguous, unintelligible,
25. and uncertain, in this:
26. It does not sufficiently appear in
27. the complaint whether the suit is for a
28. statute penalty only, or for a simple
29. trespas' and statute penalty united.

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1. If it is for both, then there is a miss-
2. join'er of causes of action, as both cannot be
3. united in the same count, nor in
4. seperate counts in the same complaint,
5. for the reason that the code has not auth-
6. orized such suit; and for the further
7. reason that some of the defendants
8. may be liable for the statute penalty,
9. when others will not be so liable, but
10. may be liable for the damages in
11. simple trespass, and seperate judgments
12. in such case cannot be united.

No. 2.

13. The evidence is in-
14. sufficient to sustain the verdict
15. against any of the defendants.

No. 3.

16. There were errors in law occurred
17. on the trial, in this:

1.

18. The court erred in overruling the
19. challenge to the array of the traverse jurors.

2.

20. The court erred in overruling the
21. claim of the defendants to peremptorily
22. challenge six jurors each.

3.

23. The court erred in not ordering the
24. plaintiffs to produce their invoices and
25. books of sales of liquors, as requested

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26. by the defendants.

4.

27. The court erred in not discharging
28. Jeter Clinton on his motion to be dis-
29. charged.

5.

30. The court erred in its charge to
31. the jury, in this:
32. That the 7th section of the ordinance
33. of Salt Lake City was void; and that the
34. warrant issued by Jeter Clinton on the
35. affidavit of William G. Phillips, pursuant
36. to said section, was void on its face.

6.

37. The court erred in charging the
38. jury that the destruction of the goods
39. was unlawful, and that each of the
40. defendants participating therein, however
41. innocent, was liaole in this action for the
42. value of the goods destroyed.

7.

43. The court erred in not instructing the
44. jury as prayed for by defendants in their
45. instructions, numbers 3, 4, 5, 6, 7, 8, 15, 16, 17,
46. & 18, as also refusing to give, as asked by
47. defendants, in numbers 8, 9, 12, 13, 14, and
19.

8.

48. The court erred in answering the two
49. questions propounded by the jury, as he
50. did. To the first question the court
51. should have answered, no; to the

179 Page 4.

second, his answer should have been, yes.

9.

The court erred in requiring the defendants to file their motion for new trial before the statement filed by them was settled by the court, and in forcing the defendants to argue the same the same evening without prepe ration.

(Signed) SNOW & HOGE,
(Signed) MINER & STOUT,
Att'ys for Def'ts.

The foregoing statement has been allowed, and is correct.
(Signed) JA'S B. McKEAN,
Chief Justice and Judge of 3d District Court.

180 (Indorsed:)

Engelbrecht et al. vs. Jeter Clinton et al. Statement on appeal from final judgment.

We accept service of this statement, Nov. 29, 1870.
(Signed) R. N. BASKIN,
Attorney for Pl'ffs.

Filed Nov. 29, 1870.
(Signed) W'M S. WALKER, *Clerk.*

Having been settled by the judge, filed on this January 19th, 1871.
(Signed) W'M S. WALKER, *Clerk.*

Snow & Hoge, Miner & Stout.

181 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, W'm S. Walker, clerk of the third judicial district court of the Territory of Utah, do hereby certify that the foregoing is a full, true, & correct transcript of the complaint, affidavit for order of arrest, order of arrest, undertaking, answer of Jeter Clinton et al., answer of Andrew Burt et al., answer of John D. T. McAllister, demurrer to answer of Andrew Burt et al., demurrer to answer of John D. T. McAllister, notice of motion for a new trial, entry of judgment, challenge to the array of jurors, notice of appeal, appeal bond, & statement in the case of "P. Engelbrecht et al. vs. Jeter Clinton et al." on file & of the record in my office.

UNITED STATES OF AMERICA, 3D DISTRICT COURT, TERRITORY OF UTAH.

Witness my hand, & the seal of said court, at Salt Lake City, this 28th day of February, A. D. 1871.
W'M S. WALKER, *Clerk.*

182 (Indorsed:) Transcript. P. Engelbrecht et al. vs. Jeter Clinton et al. Filed Feb'y 28, 1871. W'm S. Walker, cl'k.

Filed in the office of the clerk of the supreme court in & for the Terr'y of Utah, on the 2d day of March, A. D. 1871.

C. MYRON HAWLEY, *Clerk.*

183 Afterwards, to wit, on the day of 20th *day* of June, A. D. 1871, came the parties, by their respective counsel, and submitted the case to the court, which was argued by Messrs. Snow & Hoge, on behalf of the appellants, and by Messrs. Baskin & Maxwell on behalf of the appellees.

On the arguments being closed, the court adjourned, to meet again on the 2d day of October, A. D. 1871, and held the case under advisement.

Afterwards, to wit, on the 2d of October, A. D. 1871, the court met, and Associate Justice Hawley delivered in writing the unanimous opinion of the court, affirming the judgment of the court below.

Order. Supreme Court

This case having been argued by counsel at a former day of this term of court, and the court, now being fully advised in the premises, order and adjudge that the judgment of the 3d judicial district court be, and the same hereby is, affirmed, with costs to be taxed.

184 Witness the Hon. Ja's B. McKean, chief justice of said supreme court, and the seal thereof, this the 2d day of October, A. D. one thousand eight hundred and seventy-one.

[SEAL.] (Signed) C. MYRON HAWLEY,
Clerk of said Court.

185 Afterwards, to wit, on the said second day of October, A. D. 1871, Z. Snow, esq'r, one of the counsel for appellants, in open court, gave notice of application for a stay of execution in said case for ten days, for the purpose of perfecting an appeal in said case from the decision of the said supreme court of the United States in and for the Territory of Utah, to the Supreme Court of the United States of America.

After which the court took recess until two o'clock p. m.,
186 *two o'clock p. m.*

C. MYRON HAWLEY,
Clerk of said Court.

Afterwards, to wit, on the 9th day of October, A. D. one thousand eight hundred and seventy-one, appellants, by one of their attorneys, Z. Snow, filed in the clerk's office of this court a writ of error, the original of which is hereunto attached.

And afterwards, to wit, on the same day, Z. Snow, one of the counsel for appellants, filed in the office of the clerk of this court an assignment of errors, a true copy of which is hereunto attached.

And afterwards, to wit, on the same day, Z. Snow, one of the counsel for appellants, filed in the office of the clerk of this court a citation, the original of which is hereto attached.

And afterwards, to wit, on the same day, Z. Snow, one of the counsel for appellants, filed in the office of the clerk of this court a super-
187 sedeas bond, a true copy of which is hereto attached.

188 UNITED STATES OF AMERICA, *ss:*

To Paul Englebrecht, Christian Rehmke, and Fred'ric Lutz, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, persuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Utah, wherein Jeter Clinton, John D. T. McAlister, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William G. Phillips, William Hyde, Charles Livingston, Charles Crow, John Readding, James Toms, Alexander Burt, Foster Curtis, David U. Leaker, Joseph McRae, John W. Sharp, P. McKenmon, Thomas Burchell, and R. Smith are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgement in said writ of error mentioned should not be corrected
189 and speedy justice should not be done to the parties in that behalf.

Witness the Honorable James B. McKean, chief justice of the said supreme court of the Territory of Utah this 9th day of October, in the year of our Lord 1871.

JA'S B. McKEAN,
Chief Judge of the Supreme Court of the Territory of Utah.

190 We accept service of the within citation.

BASKIN & MAXWELL,
Attorneys of Defendants in Error,
By R. N. BASKIN.

OCTOBER 10, 1871.

(Indorsed:) Supreme Court of the United States. Jeter Clinton et al vs. Paul Englebrecht et al. Citation. Filed in the office of the clerk of the supreme court of the United States in and for the Territory of Utah on this the 9th day of October, A. D. 1871. C. Myron Hawley, clerk.

191 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the Territory of Utah, greeting:

Because, in the record and proceedings, as also in the rendition of a judgement in a plea, which is in said court for the trial of impeachments and the correction of errors before you, between Jeter Clinton, John D. T. McAlister, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William G. Phillips, William Hyde, Charles Livingston, Charles Crow, John Readding, James Toms, Alexander Burt, Foster Curtis, David W. Leaker, Joseph McRae, John W. Sharp, P. McKennon, Thomas Burchell, and R. Smith were appellants and Paul Englebrecht, Christian Rehmke, and Fred'ric Lutz were appellees, a manifest error hath happened, to the great damaage of the said appellants,
192 as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf:

You are hereby commanded, if judgement be therein given, that then,

under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 4th day of December, A. D. 1871, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and the custom of United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 9th day of October, in the year of our Lord one thousand eight hundred and seventy-one and of the independence of the United States the 95th.

[SEAL.] C. MYRON HAWLEY,
Clerk of the Supreme Court of the United States in and for the Territory of Utah.

193 (Indorsed:) Supreme Court of the United States. Jeter Clinton et al vs. Paul Englebrecht et al. Writ of error. Filed Oct. 9th, A. D. 1871, in the office of the clerk of the supreme court of the United States in and for the Territory of Utah. C. Myron Hawley, clerk.

194 Sheet 1, page 1.

(Let the pleadings be added.)

TERRITORY OF UTAH:

Third judicial district court, regular September term 1870—Hon. J. B. McKean, judge.

PAUL ENGELBRECHT ET AL.
vs.
JETER CLINTON ET AL.

Statement prepared pursuant to the act entitled An act to regulate proceedings in civil cases in courts of justice in this Territory, and to repeal certain acts and parts of acts, approved Feb. 17, 1870, to be used on an appeal from the final judgement rendered in this case.

1st exception.

1. On the 9th day of August, 1870, the Hon. O. F. Strickland,
2. then the judge of this district court, made an order,
3. which was by him duly signed and dated, and
4. which, in other respects, was as follows, viz:

5. TERRITORY OF UTAH,
6. *Third Judicial District Court.*
7. Hon. O. F. STRICKLAND, *Judge.*
8. Being reliably advised that the ends of justice will
9. be materially promoted by so doing, it is ordered that
10. the grand and petit jurors be drawn for the ensuing
11. term of said court as follows: Five grand and
12. five petit jurors from each of the counties of
195 1. Salt Lake and Davis, and four grand and four
2. petit jurors from each of the counties of Tooele and
3. Weber.

4. Pursuant to the above order a venire was issued,
5. but not served nor returned.
6. On the 18th day of August, 1870, the Honorable O. F.
7. Strickland, then judge as aforesaid, made
8. another order, duly signed, dated, and entitled,
9. which, in other respects, was as follows:

"On the application of Charles H. Hempstead, U. S. attorney, and pursuant to the provisions of law, it is ordered that you issue to the U. S. marshall a venire, commanding him to summon from the body of said district twenty-three good and lawful men to act as grand jurors and eighteen good and lawful men to act as petit jurors at the ensuing term of said court, and that the same be made returnable on the second Monday, to wit, the 12th day of September, A. D. 1870, the first day of said term of said court; and hereof fail not.

196 THE UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

BETWEEN JETER CLINTON, JOHN D. P. MCALISTER, Andrew Burt, Brigham Y. Hampton, Charles Bingwood, William G. Phillips, William Hyde, Charles Crow, John Readding, James Toms, Alexander Burt, Foster Curtis, David W. Leaker, Joseph McRae, John W. Sharp, P. McKennon, Thomas Burchell, Charles Livingston, and R. Smith, plaintiffs in error,
and
PAUL ENGLEBRECHT, CHRISTIAN REHMKE, AND FREDric Lutz, defendants in error.

Error to the supreme court of the Territory of Utah.

Now come the above-named plaintiffs in error and say there
197 is error in the records and proceedings in the supreme court of the Territory of Utah, in this, viz:

I. The complaint of the said defendants in error against the plaintiffs, filed in the district court of the third judicial district, did state facts sufficient to constitute a cause of action.

It is insufficient, in this: The complaint counts upon a statute, and is for a statute penalty for an alleged wil'ful and malicious injury to property; which, if true, is a felony.

Yet the complaint does not aver that the plaintiffs in error have been prosecuted for said felony, nor does it set forth any excuse why such a prosecution has not been commenced.

II. The complaint is ambiguous and uncertain, in this: It does not sufficiently appear whether the complaint is for a statute penalty only or for the statute penalty and for the value of the goods destroyed.

If it be for the statute penalty, then it is insufficiently set forth. If for the value of the goods, then there is a misjoiner of causes of action.

198 III. By the law of the Territory of Utah, jurors in territorial cases, this being one, must be selected by the county courts of the respective counties, from the qualified inhabitants.

The territorial marshall having the venire shall proceed to the clerk's office of the county court of the county from which the jurors are to be summoned. The clerk shall then, in the presence of the marshall, shake

the tickets, previously placed in a box or other safe place of deposit, and draw therefrom, promiscuously, the number of persons required; and the persons thus drawn are to be summoned and to serve as jurors. This not having been done in this case, the court erred in overruling the challenge to the array.

IV. By law each defendant is entitled to six peremptory challenges to the traverse jurors. The court, therefore, erred in refusing each of them to exercise that right.

V. The court erred in charging the jury that the destruction
199 of the goods was unlawful and that each of the defendants who participated therein, however innocent, was liable for the value of the goods destroyed.

VI. The court erred in not charging the jury, as requested by the defendants, that, before they could bring in a verdict of guilty, they must be satisfied from the evidence that the appellants knew, or at least believed, the destruction to be unlawful, and that they then willfully and maliciously destroyed them.

VII. The court erred in refusing to charge the jury, as requested in Nos. 8, 9, 12, 13, 14 of the appellants' requests.

VIII. The court below erred in its answer to the two questions presented to it by the jury.

IX. If the defendants in error may in this action recover the value of the goods only, as charged by the court, it presents this state of affairs: One defendant may be liable for one sum of money and another defendant may be liable for another sum of money, such as, one for the
200 penalty and another for the value of the goods destroyed.

X. The court below erred in charging the jury that the unlawful destruction of the goods carried with it implied malice, and that it was for the defendants to satisfy them that malice did not exist.

XI. The court below erred in charging the jury that, if there was no malice proved, the plaintiffs below were entitled to recover in this action the value of the goods destroyed.

XII. The court below erred in charging the jury that the seventh section of the ordinance was void, and the warrant issued by Jeter Clinton, alderman, was void on its face.

XIII. The court below erred refusing to charge the jury that if they believed from the evidence the defendants below believed it was their right and duty to destroy the goods they must find for the defendants.

201 XIV. The court below erred in refusing to charge the jury that if they believed from the evidence the several defendants below mentioned in the answer of Andrew Burt and others were called by and acted under the orders of John D. T. McAllister, city marshal, in assisting him to execute the warrant issued by Jeter Clinton, alderman, they must find for the defendants so acting.

XV. The court below erred in not charging the jury as requested in exceptions Nos. 8, 9, 12, 13, 14, and 19.

XVI. The supreme court of the Territory of Utah erred in affirming the judgement of the district court of the third judicial district of said Territory. The plaintiffs in error therefore pray this honorable court to reverse the judgement of the said supreme court of this Territory,
202 and render judgement for the plaintiffs herein.

E. D. HOGE,
THOMAS FITCH,
C. J. HILLYER,
Attorneys for Pl'ffs.

203 (Indorsed:) United States of America. Supreme Court of the United States. Jeter Clinton et al. vs. Paul Englebrecht et al. Assignment of errors. Filed Oct. 9, 1871, in the office of the clerk of the supreme court of the United States in & for the Territory of Utah. C. Myron Hawley, clerk. E. D. Hoge, for pl'ffs.

204 THE UNITED STATES OF AMERICA.

Supreme Court of the United States.

JETER CLINTON, JOHN D. T. MCALISTER, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William G. Phillips, William Hyde, Charles Livingston, Charles Crow, John Redding, James Toms, Alexander Burt, Foster Curtis, David W. Leaker, Joseph McRae, John W. Sharp, P. McKennon, Thomas Burchell, and R. Smith, plaintiffs in error,

vs.

PAUL ENGLEBRECHT, CHRISTIAN REHMKE, Fred'ric Lutz, defendants in error.

Know all men by these presents that we, Jeter Clinton, Andrew Burt, John D. F. McAlister, John Reading, William Phillips, Charles Ringwood, John W. Sharp, William Hyde, Thomas Burchell, Robert Smith, Brigham Y. Hampton, Foster Curtis, Alexander Burt, James Toms, Charles H. Crow, David W. Leaker, and Charles Livingston,
205 as principals, and William Jennings, John Sharp, Jessee C. Little, Feramoz Little, Horace S. Eldridge, James Townsend, and William H. Hooper, as sureties, all of the city and county of Salt Lake, and Territory of Utah, are held and firmly bound unto the above-named Paul Englebrecht, Christian Rehmke, and Fred'ric Lutz, in the sum of one hundred and twenty-five thousand dollars, to be paid to the said Paul Englebrecht, Christian Rehmke, and Fred'ric Lutz, their administrators or executors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated this 9th day of October, 1871.

The condition of the foregoing obligation is such that, whereas the above-named Jeter Clinton, John D. T. McAlister, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William G. Phillips, Wil-
206 liam Hyde, Charles Livingston, Charles Crow, John Readding, James Toms, Alexander Burt, Foster Curtis, David W. Leaker, Joseph McRae, John W. Sharp, P. McKennon, Thomas Burchell, and R. Smith have prosecuted a writ of error to the Supreme Court of the United States from the supreme court of the Territory of Utah, to reverse a judgement of the said supreme court of the Territory of Utah, rendered on the 2d day of October, 1871, in a suit therein, wherein Jeter Clinton, John D. T. McAlister, Andrew Burt, Brigham Y. Hampton, Charles Ringwood, William G. Phillips, William Hyde, Charles Livingston, Charles Crow, John Readding, James Toms, Alexander Burt, Foster Curtis, David W. Leaker, Joseph McRae, John W. Sharp, P. McKennon, Thomas Burchell, and R. Smith were plaintiffs in error, and Paul Englebrecht, Christian Rehmke, and Fred'ric Lutz were defendants in error:

207 Now, therefore, if the above-named plaintiffs in error shall pros-

ecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to be in full force and virtue.

JETER CLINTON.	[L. S.]	ROBERT SMITH.	[L. S.]
ANDREW BURT.	[L. S.]	BRIGHAM Y. HAMPTON.	[L. S.]
JOHN W. SHARP.	[L. S.]	FOSTER CURTIS.	[L. S.]
JOHN READING.	[L. S.]	ALEX. BURT.	[L. S.]
WILLIAM PHILLIPS.	[L. S.]	JAMES TOMS.	[L. S.]
CHARLES RINGWOOD.	[L. S.]	C. H. CROW.	[L. S.]
WILLIAM HYDE.	[L. S.]	D. LEAKER.	[L. S.]
THO'S BURCHELL.	[L. S.]	CHARLES LIVINGSTON.	[L. S.]
JOHN D. T. MCALLISTER.	[L. S.]	FERUMOZ LITTLE.	[L. S.]
WILLIAM JENNINGS.	[L. S.]	H. S. ELDRIDGE.	[L. S.]
JOHN SHARP.	[L. S.]	JAMES TOWNSEND.	[L. S.]
J. C. LITTLE.	[L. S.]	H. H. HOOPER.	[L. S.]

(Indorsed:) Supreme Court of the United States. Jeter Clinton et al. vs. Paul Englebrecht et al. Supersedeas bond.

We accept the sufficiency of the sureties on said bond.

BASKIN & MAXWELL,
Attorneys for Paul Englebrecht, Christian Rehmke, & Fred'rick Lutz.

I approve this bond, Oct. 9, 1871.

JA'S B. MCKEAN,
Chief Judge.

Filed in the office of the clerk of the supreme court of the United States in and for the Territory of Utah this 9th day of October, A. D. 1871.

C. MYRON HAWLEY, *Clerk.*

208 In the supreme court of the United States in and for the Territory of Utah.

JETER CLINTON ET AL., APPELLANTS,
vs.
PAUL ENGLEBRECHT ET AL., APPELLEES. } On appeal.

In obedience to the writ of error in the above-entitled case, issued from the Supreme Court of the United States of America, Honorable Salmon P. Chase presiding, the original of which is hereto attached, I, C. Myron Hawley, clerk of the supreme court of the United States in and for the Territory of Utah, do hereby return the foregoing and attached transcript of the record in the case now on file in the office of the clerk of the supreme court of the United States in and for said Territory in said writ mentioned, and I do hereby certify that the annexed and foregoing transcript is a full, true, correct, complete, and perfect copy of the
209 record of the said case in said writ mentioned now on file in my said office.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court in and for the Territory of Utah, at Salt Lake City, in said Territory, this the 30th day of October, A. D. one thousand eight hundred and seventy-one, and of the independence of the United States of America the 96th.

[SEAL.]

C. MYRON HAWLEY,
Clerk of said Supreme Court of the United States, in and for the Territory of Utah.

(Indorsement on cover:) No. 379. Jeter Clinton, J. D. T. McAlister, A. Burt, Brigham Y. Hampton, C. Ringwood, W. G. Phillips, W'm Hyde, Cha's Livingston, Cha's Crow, J. Readding, J. Toms, A. Burt, F. Curtis, D. W. Leaker, J. McRae, J. W. Sharp, P. McKennon, Tho's Burchell, & R. Smith, plaintiffs in error, vs. Paul Englebrecht, Christian Rehmke, & Frederic Lutz. Utah Terr'y sup. court. Filed 15th November, 1871.

Supreme Court of the United States.

JETER CLINTON ET AL., PLAINTIFFS IN ERROR,

vs.

PAUL ENGLEBRECHT ET AL., DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

This action was brought in the third District Court of the Territory of Utah, to recover a penalty under section 102 of the territorial statutes, in relation to crimes and punishments, which reads as follows:

"If any person maliciously injure, deface, or destroy any building or fixture attached thereto, or willfully and maliciously injure, destroy, or secrete any goods, chattels, or valuable paper of another, or maliciously prepare any deadfall, or dig any pit, or set any gun, or arrange any other trap, to injure another's person or property, he shall be imprisoned not more than one year, or fined not exceeding five hundred dollars, or both fined and imprisoned, at the discretion of the court; and is liable to the party issued in a sum equal to three times the value of the property so destroyed, or injured, or damage sustained in a civil action." (Laws of Utah, p. 59, sec. 102.)

The defendants in error were retail liquor sellers in the City of Salt Lake. An ordinance of the city required that liquors should not be sold at retail without the previous payment of a license. (See transcript of Record, p. 22.)

The same ordinance required that, upon complaint being

made before an alderman of the city, and upon its appearing to him that the above provisions are being violated, he shall issue a warrant, "directed to the city marshal, or any of his deputies, commanding them to enter said house or place, and demolish all things found therein made use of for the purpose of manufacturing, selling, or otherwise disposing of spirituous, vinous, or fermented liquors," &c. (Record, p. 23.)

Under this ordinance a warrant was issued by Jeter Clinton, an alderman of the city, one of plaintiffs in error, and delivered to McCallister, another of plaintiffs in error, and then marshal of the city, commanding him to enter the store of Englebrecht, who had refused to pay his license, and destroy the liquors therein. (For copy of warrant, see Record, p. 21.) McCallister summoned the other plaintiffs in error as a *posse comitatus*, and proceeded to the store and destroyed the liquors which were found therein. Thereupon, Englebrecht and the other defendants in error, claiming to be his partners, commenced this action to recover three times the value of the property destroyed, according to the statute above quoted. The complaint charged the actual value of the liquors destroyed to have been $22,589 $\frac{75}{100}$, being the retail selling prices of the same, (Record, p. 31,) and demanded a recovery for $67,769 $\frac{25}{100}$. The case was tried by a jury procured by the United States marshal, under an open *venire*, promiscuously from the body of the judicial district. A verdict was rendered against the plaintiffs in error for $59,063 $\frac{25}{100}$, and judgment entered accordingly. (Record, p. 47.) From this judgment an appeal was taken to the Supreme Court of the Territory, upon a statement containing bill of exceptions, according to the practice act of the Territory, (Laws of Utah, p. 78;) a copy of which statement will be found in the Record, commencing at page 53 and ending page 71. In the Supreme Court the judgment of the court below was affirmed, (Record, p. 72,) and from this latter judgment the present writ of error is prosecuted to this court under the provisions of the ninth section of the organic act of the Territory. (Laws of Utah, p. 27.)

Argument.

First. The court below erred in overruling the challenge of plaintiffs in error to the jury panel from which the trial jurors were selected. The facts and exceptions respecting this point are set forth in the statement on appeal on pages 53 and 54 of transcript of Record. The question raised by this exception is the same as that recently discussed in this court in the case of Hosea Stout *vs.* The People of the Territory of Utah; and to avoid repetition I ask leave to file the briefs made by plaintiff in error in that case (copies of which have already been furnished to defendants' counsel) as my argument upon this point in the case at bar.

Second. The District Court erred in its instructions to the jury. The court was asked by the then defendants (now plaintiffs in error) to give in charge to the jury a number of distinct legal propositions, which were submitted in writing. The refusal of the court to give each of these instructions was excepted to by the defendants. These exceptions will be found in the statement on appeal on pages 63, 4, 5, 6, 7, and 8 of the Record.

One of the instructions refused was as follows:

"Before the jury can bring in a verdict of guilty against the defendants, or any of them, they must be satisfied from the evidence that the destruction of the goods was not only unlawful, but that they were willfully and maliciously destroyed, and that the defendants knew, or verily believed, it was unlawful, and then willfully and maliciously destroyed them." (Record, p. 63.)

Another, aimed at the same point, was as follows:

"If the jury believe from the evidence there was probable cause for the defendants, or any of them, believing they had a right, and it was their duty, to destroy the goods, and that they acted under such belief, then the jury must find for such defendant or defendants, as the case may be."

The evidence showing the pertinency of these instructions is set forth on the Record from page 55 to page 63. The court refused to give these and several similar instructions; and, in its own charge entirely failed to give the jury any definition of the terms willful and malicious, which would assist them in determining whether the defendants were

liable under the statute. The instructions asked for by defendants were correct. The action is based entirely upon the penal statute hereinbefore cited, (see complaint, Record, p. 2.) The complaint contains but one count, and that is a count upon the statute. To justify a recovery it was necessary to prove that the defendants had been guilty of the crime of malicious mischief, by the statute made a felony. Whether the warrant of the magistrate was valid or not, if the defendants believed it to be so and did the acts imputed to them under a supposition that it was their duty to do them, then they were not guilty of this offence, and the judge should have so told the jury, as requested by defendants.

In Bishop on Crimnal Law, (vol. 2, p. 837,) the author says: "Now, the mind, in a case of malicious mischief, must act from malice, and, according to the general doctrine, the malice must be against the owner of the property and not against another or the property itself, it not being, for instance, sufficient when a man kills an animal out of ill-will toward it." And again, (p. 838,) "Plainly, if the act is done under a *claim* of right, the offence is not perpetrated—the same principle applying here as in larceny."

It is needless to cite authority, for about the rule of law there is no doubt. To refuse to state it to the jury in plain terms when requested was error, and it was a substantial injustice to the defendants to leave the import of the legal terms used in the statute to be guessed at by twelve men ignorant of the law, and, from the mode of their selection, not unlikely to be prejudiced against the defendants.

Third. The complaint does not state a sufficient cause of action, for the reason that the acts charged against the defendants constitute under the laws of the Territory a felony, and no civil action for a penalty can in such cases be maintained without averment and proof of the commencement of a criminal prosecution. (Bishop on Criminal Law, sec. 329, and cases there cited.)

Respectfully submitted:

C. J. HILLYER,
Attorney for Plaintiffs in Error.

Supreme Court of the United States.

HOSEA STOUT, Plaintiff in Error,

vs.

THE PEOPLE OF THE UNITED STATES IN THE TERRITORY OF UTAH.

STATEMENT.

Hosea Stout, the plaintiff in error, was arrested in the Territory of Utah, by the marshal of said Territory, on the twenty-eighth day of October, 1871. The authority for the arrest was a warrant issued from the district court of the third judicial district, purporting to be based upon an indictment found by a grand jury of said Territory, at the September term of said court. The indictment charged the commission, in the year 1857, of the crime of murder, under the statute of the Territory. The grand jury, by whom it was found, was a body of men, twenty-two in number, selected by the marshal, in obedience to an open venire, issued to him by order of said court. There was in force at the time a law of said Territory, prescribing the mode of procuring panels of grand and petit jurors, of which a copy is hereto appended. In the procurement of the panel by which this indictment was found, the provisions of this law were intentionally disregarded, and the selection was made from the inhabitants of the Territory at the discretion of the officer. The accused, upon his arrest, being advised that the proceedings were illegal, and the indictment and warrant invalid, applied to the supreme court of said Territory for a writ of *habeas corpus*, and in

the application set forth the facts, substantially as above stated. The court refused the application, basing its refusal upon the ground that the grand jury had been properly constituted, and that the territorial law in relation to the formation of jury panels was not binding upon the district courts of the Territory. (See Record, page 6.)

For the purpose of obtaining a review of this decision, the case is brought to this court by writ of error, as specially permitted by the organic act of said Territory. (Organic Act, sec. 9.)

ARGUMENT.

The only question of practical importance presented by the record, and the only one which (unless required by some suggestions from the defendant in error) I propose to discuss, is this: Is the law of the territorial legislature, prescribing the mode of obtaining panels of grand and petit jurors, obligatory upon the district courts of the Territory? The territorial law, as will be seen from an examination of its provisions, is in harmony with the usual State and territorial statute regulations upon this subject. It provides for lists to be made out in the several counties, by boards of county officers, at stated periods, and that the names of persons to constitute jury panels shall, as required, be selected from these lists by lot. It is designed to secure impartiality, and exclude, as far as possible, the influence of individual prejudice; and it fairly accomplishes this object. It is open to no objection, except that of invalidity, by reason of want of authority in the legislative body to legislate upon the subject.

The organic act, which has properly been called the constitution of the Territory, provides for the formation of a territorial legislature, and defines its power as follows:

"SEC. 6. *And be it further enacted*, That the legislative power of said Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil, no tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents." (Brightly's Digest, p. 890.)

It will not be denied that the mode of procuring panels of jurors is a "rightful subject of legislation." The law in question is, therefore, valid and binding upon the courts, unless it is inconsistent with the Constitution of the United States or with the provisions of the organic act. The Constitution is silent upon the subject. The only clause in the organic act where the term jury is used, or the subject referred to, is that which says that, "but in no case removed to the supreme court shall trial by jury be allowed in said court." The organic act seems, therefore, in plain terms, to authorize the legislation, and I should add nothing to the simple citation of its provisions, were it not that the judges of the territorial court have, with great unanimity, reached a contrary conclusion. In order that the argument in favor of this conclusion, so far at least as it has been up to this time developed, may be distinctly understood, I have appended in full the original opinion upon this subject by the chief justice of the Territory, which has since been followed in respect to grand juries, and applied also to all trial juries, in these courts.

I gather from a careful reading of this decision that the reasoning upon which it rests is substantially this: The district court of the Territory is a district court of the United States, and therefore the general law of Congress, prescribing how juries shall be obtained in the courts of the United States, is binding upon the territorial court, and should be followed in preference to the territorial statute.

There is no question of the complete supremacy of the laws of Congress in the premises. The organic act itself provides, that the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory, so far as the same, or any provisions thereof, may be applicable. The error of the decision is in assuming that there is legislation by Congress upon the subject of the formation of juries in the territorial courts. The only existing law upon the subject, to which reference can possibly have been made, is the following:

"Jurors, to serve in the courts of the United States in each State respectively, shall have the like qualifications and be entitled to like exemptions as jurors of the highest court of law of such State now have and are entitled to, and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries now practiced and hereafter to be practiced therein, in so far as such mode may be practicable, by the courts of the United States, or the officers thereof; and for this purpose the said courts shall have power to make all necessary rules and regulations for conforming the designation and impanneling of juries in substance to the laws and usages now in force in such State; and further shall have power, by rule or order, from time to time, to conform the same to any change in these respects which may be hereafter adopted by the Legislatures of the respective States for the State courts."

In the first place, it seems somewhat singular that this section, even if it were applicable, should be quoted as authority for what has been done by the Utah court. It was enacted for the express purpose of securing impartiality and preventing the exercise of arbitrary discretion by the marshal, and it is difficult to conceive how it can be tortured into an authority to arm that officer in all cases with an open venire. Not only have its provisions not been followed, but it has been, in letter and spirit, defied and disobeyed. Where, in the circuit court of the United States, a jury panel had been summoned in the same manner for which the Utah court finds authority in this section of the law, the circuit court quashed the proceedings and dismissed the panel, upon the ground that the mode pursued was in direct violation of the provisions of the same section. (United States *vs.* Woodruff, 4 McLean's C. C. R., 109.)

In the second place, it is evident at the first glance that this section does not apply to the territorial courts. The language is: "That jurors to serve in the courts of the United States *in each State respectively*," &c. And the entire machinery is such as can only be used by a court sitting within the limits of a State. The organic act says that only those laws of Congress which are *applicable* shall be in force in this Territory, and this is certainly not one of them.

But there is a broader objection than either of these to making this section subserve the proposed purpose, and that is, that the court of Utah is not in any such sense a

court of the United States that a general law regulating either the jurisdiction or the procedure of those courts would affect the territorial tribunal, unless included therein by express terms.

The term "courts of the United States" is one frequently used in acts of Congress, and has a well-understood signification. It is used to designate those tribunals which belong to the judicial system established by the IIId article of the Constitution of the United States, and with whom is lodged the jurisdiction conferred by the 2d section of that article. They are the "supreme and inferior courts" who exercise "the judicial power of the United States." To this system the territorial courts do not belong. They derive their powers from a different source, and have neither the same structure nor the same jurisdiction. The 9th section of the organic act, establishing the courts of this Territory, contains the following provisions:

"*And be it further enacted*, That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said Territory annually, and they shall hold their offices *during the period of four years.* * * * The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, *shall be as limited by law.* * * * Writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of said district courts to the supreme court, under such regulations *as may be prescribed by law.*" (Brightly's Digest, p. 892.)

The chief justice, who, as seen in the decisions quoted—not from any analysis of powers, but from a mere collocation and comparison of names—satisfies himself that his court is a district court of the United States, holds his office for a term which, by the Constitution, is not permitted to the judge of a court of the United States, and is engaged nine-tenths of his time in the trial of causes of which no United States court can, by the Constitution, have jurisdiction. The whole question, as to the status of a territorial court, has been thoroughly examined and fully decided in this court. In the case of the American Insurance Co. *vs.* Carter, (1 Pet., p. 546,) Chief Justice Mar-

shall, delivering the opinion, in speaking of the territorial courts of Florida, says:

"These courts, then, are not constitutional courts, in which the judicial powers conferred by the Constitution on the general Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the IIId article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States."

In Benner *et al. vs.* Porter, (9 How., 235,) the subject was again fully considered and the former decision affirmed; and in deciding as to the status of the court, and the effect upon it of the organization of a State government for the Territory, the court says:

"The distinction between the federal and State jurisdictions, under the Constitution of the United States, has no foundation in these territorial governments; and consequently no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts—Congress, in the exercise of its powers, in the organization and government of the territories, combining the powers of both the federal and State governments. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and federal jurisdiction. They are not organized under the Constitution, nor subject to its complex distribution of the powers of the government as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. * * * We think it clear, therefore, that, on the unconditional admission of Florida into the Union as a State, on the 3d of March, 1845, the territorial government was displaced, abrogated, every part of it, and that no power of jurisdiction existed within her limits, except that derived from the State authority, and that by force and operation of the federal Constitution and laws of Congress, and especially no jurisdiction in federal cases, until Congress interfered, and extended the judicial tribunals of the Union over it."

* Since these decisions I know of no re-examination of the subject in this court. They show that these territorial courts are, by their origin, their structure, and their jurisdiction, as widely separated from the constitutional judiciary system of the United States as are the State courts. They in certain cases exercise a portion of the same jurisdiction as do the circuit and district courts of the United States, and so also do the State courts. It is possible, if one so choose, to call them courts of the United States, because they derive their authority from Congress; but

* 3d Opin. of Atty Genl p 409

there is no reasonable excuse for seizing upon a forced analogy in names for the purpose of bringing these legislative tribunals within the provisions of laws of Congress, made for and by their terms only applicable to those United States courts proper established under the judiciary article of the Constitution.

The jury provision in question prescribes a mode impossible to be employed by a territorial tribunal; and the only event which could make its terms applicable, to wit, the admission of Utah as a State, would, as decided in Benner *v.* Porter, of itself, terminate the existence of the court. If this section could be held to embrace the territorial courts, then they would be embraced in each of the numerous enactments respecting the district courts of the United States; for there is no one of them from which the language and sense more imperatively requires that they should be excluded.

The key of the decision is found in the interrogatory: "Can it be that a court with such powers is left by Congress to the control of the Legislative Assembly of the Territory?" The question seems to betray a misapprehension, not only of the status of the court, but of the object for which it was established. The chief justice appears to regard it as an instrument for the enforcement upon the people of the Territory of the edicts of the federal Government, instead of part of a system, of which the main object is in accordance with the general popular spirit of our institutions, to permit the people of the Territory to govern themselves.

The general clause conferring jurisdiction upon the court is, that the jurisdiction shall be "as limited by law;" that is, by the law of that same territorial legislature from which the court seems to deem it so necessary to emancipate itself. It is true, there are certain provisos, and that the court is made the arbiter of "cases arising under the Constitution and laws of the United States." But this portion of jurisdiction is, in amount and importance, insignificant, compared with that which has its source in the

terrritorial law. The real magnitude of the powers of the court lies in the fact, that it is intrusted with the decision of the ordinary questions affecting life, liberty, and property, to which the daily intercourse of a populous and industrious community gives rise. When the security of a people, in the titles to their farms and their mining claims, in their contracts and their personal liberty, is placed under the guardianship of a judicial tribunal, constituted as are these territorial courts, it is not strange, nor should it be the cause of any uneasiness, that it is permitted to the people themselves to determine, by the usual legislative provisions, the mode of selecting the panels of jurors, whose fairness and impartiality are to them a matter of such vital interest. Respectfully submitted,

C. J. HILLYER,
For Plaintiff in Error.

APPENDIX.

AN ACT defining who are exempt from serving on juries, and prescribing the mode of procuring grand and petit jurors for the district courts, and for other purposes.

SEC. 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah*, That members and officers of the Legislative Assembly, judges of probate courts, selectmen, county treasurers, clerks of the supreme, district, probate, and county courts, the territorial marshal, deputy marshals, sheriffs, deputy sheriffs, constables, attorneys and counsellors at law, persons at the time engaged in teaching school, ferrymen, millers, physicians, surgeons, and editors of newspapers and other periodical publications, are exempt from serving either as grand or petit jurors.

SEC. 2. The county court in each county shall, at its first session in each year, and at such subsequent session, or other time as a neglect so to do at said first session, or as other circumstances may require, make, from the assessment roll of the county, a list containing the names of at least fifty men, residents of the county, eligible to serve as jurors.

SEC. 3. Said list shall contain only the names of such persons as are known or believed to possess the requisite qualifications for jurors, and not entitled to exemption from jury service; and the names thereon shall be apportioned among the different sections of the county, as nearly as may be, according to the names on the assessment roll; and the selections of persons to serve as jurors shall from time to time be made in such manner, so far as the county court can judge, as to cause the eligible persons to perform jury duty as nearly as may be in rotation.

SEC. 4. Said list shall contain the christian and surname at length, and the place of residence and occupation, of each person named therein, and shall be filed with the clerk of the county court, who shall keep in his office a box or other safe place of deposit in which he shall deposit the names on the list, having previously written each name on a separate ticket, and so folded said ticket that the name thereon does not appear.

SEC. 5. When a district court is to be held, whether for a district or for a county, the clerk of said court shall, at least thirty days previous to the time of holding said court, issue a writ to a marshal or any of his deputies, if said court is to be holden for a district, or to the sheriff or any of his deputies of the county in which said court is to be held if it is to be held for a county, specifying the time and place of holding said court, and requiring him to summon, if for a grand jury, twenty-four eligible men to serve as grand jurors; and, if for petit jurors, twenty-four eligible men to serve as petit jurors; and said twenty-four men shall constitute a grand jury; and said twenty-four men shall constitute two full petit juries.

SEC. 6. Upon the reception of said writ, a marshal or sheriff, as the case may be, or either of their deputies, shall proceed to the clerk of the county court of the county in which jurors are to be summoned, and said clerk shall forthwith repair, with said officer having said writ, to the office of said clerk, who shall, if a grand jury is required, in the presence of said officer, thoroughly shake the tickets previously deposited in a box or other safe place of deposit, and draw therefrom promiscuously twenty-four tickets, and the persons whose names are on those twenty-four tickets shall be summoned to serve as a grand jury, a minute of which drawing shall be kept by said clerk, with the names entered thereon in the order they are drawn; when, if petit

jurors are also required, said clerk shall proceed in like manner to draw and minute twenty-four tickets, and the twenty-four persons named on said tickets shall be summoned to serve as petit jurors; said clerk and attending officer shall then sign the minutes of the drawing, which minutes shall be filed by said clerk in the office of the county court of the country in which said drawing was had.

SEC. 7. Upon the conclusion of the drawing, and previous to the filing as aforesaid, said clerk shall forthwith make a list of the names of the persons drawn, if any, to serve as petit jurors, and certify to said list, or lists, and deliver it, or them, to the officer having the writ from the clerk of a district court to summon jurors.

SEC. 8. The officer having the writ and jury list, or lists, in charge, as hereinbefore provided, shall, immediately upon his reception of said list, or lists, proceed to summon the persons named on said list, or lists, to attend said court, specifying the time and place of its sitting; which summons shall be served by giving each person a written notice, or by leaving a copy of the summons at his residence in care of some person of suitable age and discretion.

SEC. 9. If, in summoning the persons named on said list or lists, said officer becomes aware that, from any cause beyond his control, there will be a failure by one or more of said persons to appear as required, he shall forthwith repair to the aforesaid clerk of the county court, who shall, with said officer, proceed to draw, as hereinbefore provided, until the required number of jurors can be procured; and said officer shall return said list, or lists, and writ to said district court at the time specified, and shall specify the persons summoned, and the manner in which each was summoned.

SEC. 10. When a district court is to be held for a district, and the judge thereof is reliably advised that the ends of justice will be materially promoted by so doing, said judge may apportion the twenty-four grand jurors among two or more counties in his district.

SEC. 11. After a grand jury is empanneled, sworn, or affirmed, and charged by the court, said court shall appoint one of their number to be their foreman; and said foreman shall have power to swear or affirm all witnesses to testify before said grand jury; and shall, when the grand jury or any twelve of them have, upon to them good and sufficient evidence, found a bill of indictment, indorse thereon the words, to wit: "A true bill," and officially sign his name to said indorsement, and also note or cause to be noted on the bill of indictment the name or names of the witnesses upon whose evidence it was found.

SEC. 12. The clerk of the district court shall write upon separate tickets the names of the persons returned to serve as petit jurors, shall so fold said tickets that their names thereon do not appear; shall deposit them in a box or other safe place of deposit; and, when ordered by the court, draw from said box or place twelve names; and the persons whose names are drawn shall constitute a petit jury, except such as are legally rejected; and, in case of such rejection, said clerk shall continue to draw until said petit jury is complete; and, if the number of the petit jurors returned to said court shall be exhausted, then the proper officer shall, upon the order of the judge, summon talesmen from the body of the county to complete said panel.

SEC. 13. If, during any term of said district court, the number of jurors provided proves insufficient, the clerk of said court shall immediately issue a writ, directed to one of the officers before named as the persons to serve such writs, for the requisite number; and said officer shall at once proceed to procure them in the manner hereinbefore provided; and, in case said writ exhausts the names already selected, the clerk of the county court of the proper county shall forthwith call a meeting of said court, which shall immediately select, in the manner already specified, at least as many names as may at that time be deemed sufficient.

SEC. 14. A district court is hereby empowered to sit at the county seat of any county within its district, to try cases arising in such county, whenever

the county court of said county shall make provision to defray the expenses of said district court.

SEC. 15. If any person fails to appear as a grand or petit juror when lawfully summoned, or if a marshal, or his deputy, or any clerk of the district or county court, or any sheriff, or his deputy, fails to fulfill the duties enjoined upon him in this act, without having a reasonable excuse, he shall be considered guilty of contempt, and may be fined for each offense, for the use of the county in which the defendant resides, in any sum not exceeding fifty dollars, unless, at or before the next term of said district court, good cause be shown for such failure: *Provided*, That the oath or affirmation of any such delinquent shall at all times be received as competent evidence in his favor.

SEC. 16. It shall be the duty of the clerk of a district court, at the close of each term of said court, to made out and give to each juror a certificate certifying the number of days' attendance of and amount of compensation due to said juror, which certificate, upon being presented to the county court of the county from which said juror was summoned, shall entitle said juror to be allowed and paid by said county the sum specified in said certificate, as other demands against the county are paid: *Provided*, That no juror shall be paid out of the county treasury for any jury service for which he may have received or be entitled to receive pay for sitting as a juror upon United States business.

Approved January 21, 1859.

AN ACT to amend "an act defining who are exempt from serving on juries, and prescribing the mode of procuring grand and petit jurors, and juries for district courts, and for other purposes," approved January 21, 1859.

SEC. 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah*, That sections five, six, and ten of the act defining who are exempt from serving on juries, and prescribing the mode of procuring grand and petit jurors, and juries for district courts, and for other purposes, approved January 21, 1859, be, and the same hereby are, repealed, and in lieu thereof the following be enacted: When a district court is to be held for a district, and the judge thereof is reliably advised that the ends of justice will be materially promoted by so doing, he may apportion the jurors, both grand and petit, between two or more counties of his district.

SEC. 2. When a district court is to be held, whether for a district or for a county, the clerk of said court shall, at least thirty days previous to the time of holding said court, issue a writ to the territorial marshal, if said court is to be holden for a district, or to the sheriff of the county in which said court is to be held, if said court is to be held for a county, specifying the time and place of holding said court, requiring him to summon eighteen eligible men to serve as grand jurors, and eighteen eligible men to serve as petit jurors.

SEC. 3. Upon the reception of said writ, the territorial marshal or sheriff, as the case may be, shall proceed to the office of the clerk of the county court of the county from which jurors are to be summoned, and the said clerk shall, in the presence of the officer, thoroughly shake the tickets previously deposited in a box or other safe place of deposit, and draw therefrom promiscuously the number of jurors required to be summoned from such county for grand jurors and for petit jurors, keeping separate lists; and those drawn for grand jurors shall be summoned for grand jurors, and those drawn for petit jurors shall be summoned for petit jurors, which lists shall be signed by the clerk and officer having said writs, and filed in the office of said clerk.

SEC. 4. The court shall impannel out of the list summoned as grand jurors fifteen eligible men to serve as a grand jury: *Provided*, If, from any cause, there shall not be in attendance upon the court of those summoned for a grand jury enough to make the number of fifteen, the court may order the

pannel to be made up of those summoned for petit jurors, or from eligible talesmen summoned from the body of the county or district, as the case may be, and not from the bystanders.

Approved February 18, 1870.

Opinion of Chief Justice James B. McKean.

McKEAN, C. J. The Legislative Assembly of this Territory possesses large powers. The act of Congress organizing the Territory, approved September 9, 1850, provides "that the legislative power of said Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act." But the Legislative Assembly derives none of its powers from the Republic of Mexico, to which the Territory once belonged. That Assembly is the creature of the Congress of the United States, and has no powers save such as are delegated to it, expressly or impliedly, by the act organizing the Territory. And Congress, in that act, reserved to itself the right to disapprove any and all acts of the Assembly, even when such acts are within the scope of the powers delegated to the Assembly. If any acts of the Assembly are beyond the scope of the powers delegated to it, they may be set aside by the courts as well as by Congress. There is but one sovereignty in Utah, and that is the sovereignty of the United States.

Having considered the powers and limitations of the Legislative Assembly, let us next inquire what are the powers and limitations of this court. What kind of a court is it? It is certain that it was neither created, nor can be abolished, by the Legislative Assembly of Utah. Its judge was not appointed nor elected, nor can he be removed nor impeached, by the Assembly. This court is not technically a territorial court. No one claims that it is a State court. Its jurisdiction is without the bounds of the States, and it derives none of its authority from any of the States. Under the United States Government there are several tribunals. There is such a tribunal as the Supreme Court of the United States, whose terms are held in the Capitol at Washington. There is such a tribunal as the district court of the United States for the northern district of the State of New York. The act of Congress organizing this Territory (sec. 10) refers to such a tribunal as the "district court of the United States for the present Territory of Oregon." There is such a tribunal as the district court of the United States for the third district of the Territory of Utah; and this last-named court is here and now in session. When, in October next, the judge of this court shall sit here, with his brothers Strickland and Hawley associated with him, that tribunal will be the supreme court of the United States for the Territory of Utah. The supreme and districts courts of this Territory are, therefore, courts of the United States.

The act of Congress organizing this Territory provides, that "the said supreme and districts courts, respectively, shall possess chancery as well as common-law jurisdiction." It further provides, that "each of the said district courts shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States." It further provides, "that the six first days of every term of said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said Constitution and laws." That is to say, this district court has greater powers than those vested in the United States circuit and district courts within the States; for, after devoting, if necessary, the first six days of this term to the trial of causes arising under the Constitution and laws of the United States, then this court must proceed to hear any such causes as, in the States, are tried in the State courts which possess chancery as well as common-law juris-

diction. This last-named jurisdiction is given to this court for the reason that Utah is not a State, but is a Territory. Can it be that a court with such powers is left by Congress to the control of the Legislative Assembly of the Territory?

Is there any law prescribing the manner of procuring grand and petit jurors for criminal cases in this court? If there is, what is it? Is it an act of the Congress of the United States, or an act of the Legislative Assembly of the Territory? If both, are they consistent with each other? And if inconsistent, which must prevail?

While acting by assignment in this district, Mr. Justice Strickland, "upon notification by the United States attorney, that a grand jury would be needed," and also in the exercise of "his own discretion," ordered a *venire* to be issued by the clerk of this court to the United States marshal for the Territory. He did so in pursuance of those well-known acts of Congress which prescribe this method of procuring juries in the circuit and district courts of the United States. The service of that *venire* by the marshal has brought these jurors into court. The act organizing the Territory (sec. 10) requires the marshal to perform the same duties as the marshal of the district court of the United States for the then Territory of Oregon; and those duties were the same as those of the marshal in the northern district of New York. One of those duties is the summoning of juries.

In the case of Branningan *v.* The People, decided by the supreme court of this Territory, and cited on the argument here, the petit jury was not summoned in accordance with either the laws of Congress or those of the Assembly. The conviction of the prisoner was, therefore, properly set aside.

Having considered the powers and limitations of the Legislative Assembly, and also of this court, let us now inquire what the Legislative Assembly has done or undertaken to do in the premises.

As already stated, the act to organize the Territory was approved September 9, 1850, and until January, 1853, more than two years thereafter, the Assembly seems not to have touched the question of grand and petit jurors for criminal cases in this court. Was there then no law upon this subject during those two years? Judge Snow, the senior member of this bar, to whose learned and exhaustive argument in support of this challenge I listened with great interest and pleasure, was the first judge who sat on the bench where I now have the honor to sit; and that learned judge, in pursuance of the acts of Congress, ordered the *venires* to be issued to the United States marshal for the Territory of Utah, and that marshal summoned the jurors. I am not now saying whether that was right or wrong; but this I will say, that if it was wrong, then every man indicted and every man convicted during those years was unlawfully indicted and unlawfully convicted.

But what did the Legislative Assembly do in January, 1853? It enacted thus: "In jury cases, before the introduction of any evidence, the court shall issue an order, requiring an officer to summon, for that purpose, a reasonable number of judicious men," &c.; and further, thus: "When necessary, the court shall issue an order, requiring an officer to summon fifteen judicious men, residents of the county, for a grand jury," &c. Whether this act was intended to apply to this court or not, it makes no attempt to take from the court the control of the *venire*. The words, an officer, may mean, and should be construed to mean, the "proper officer of the court"—in this instance the United States marshal; and that officer is left at liberty to summon whom he pleases, provided they be "judicious men." There is in these particulars no necessary conflict between Congress and the Assembly.

The act of Congress to organize the Territory (sec. 9) provides "that the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace." The Assembly can no more add to this number of judicial bodies than it can abolish one or all of these. But by act, approved Jan. 8, 1866, the Assembly has enacted that the probate judge in connection with three select men shall be known as the

"county court." Among the many duties devolved upon this "county court" are the "care, custody, and management of insane persons, who are incapable of conducting their own affairs and of their estate, both real and personal;" and "the selectmen may transact business separately, subject to the approval of the "county courts," relating to the poor, insane persons, orphans, and minors," &c. "They shall also have power to appoint guardians for minors who are orphans, for the persons and property of the insane," &c. By another act, the Assembly directs these "county courts" to select the men from among whom it commands the jurors to be taken for this district court. It is not necessary, however, in disposing of the question at bar, to pass upon the legality of these "county courts."

But the Legislative Assembly, by act of January, 1859, amended in February, 1870, has sought to take from the district judge, the United States attorney, and the United States marshal, all control over the jurors of this court. Congress says that the judge, in his own discretion, or upon a notification by the attorney that a jury will be needed, shall order the *venire* to issue; the Assembly goes by the judge, goes by the attorney, and commands the clerk to issue it. Congress says that the *venire* shall issue to the United States marshal; the Assembly says it shall issue to an officer whom it has elected, and whom it calls the territorial marshal. Congress says that twenty-three men shall be summoned for grand jurors; the Assembly says that eighteen shall be summoned. Which must give way—the Congress or the Assembly?

The challenge to the array must be overruled, and the demurrer thereto sustained. Let the grand jury be sworn.

Supreme Court of the United States.

DECEMBER TERM, 1871.

HOSEA STOUT, Plaintiff in Error,

vs.

THE PEOPLE OF THE UNITED STATES IN THE TERRITORY OF UTAH.

REPLY TO BRIEF FOR DEFENDANTS IN ERROR.

First. It is contended by defendants in error that, when the warrant of arrest is regular on its face, and purports to be based on indictment, the legality of the constitution of the grand jury, by whom the indictment was found, cannot be inquired into on *habeas corpus.*

I have not been able to find any case in which this precise point has been decided. In none of the cases cited in the brief of defendants in error is the question discussed or directly decided. It must therefore be [illegible] by general principles and analogies. Althoug[illegible] are very various and by no means reconcil[illegible] I think there is a general agreement to these propos[illegible]

Where the arrest is by virtue of process issuing from a court over which the court or officer to whom the application is made has no supervisory jurisdiction in reference to the offense charged, the existence, validity, and present legal force of the process can be inquired into. Where the supervisory jurisdiction does exist, a wider discretion is permitted in examining into the circumstances attending the arrest. The existence of the process is determined by inspection. Its validity depends upon the existence of the legal precedents to its issuance. If the preliminary pro-

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Where the arrest is by virtue of process issuing from a court over which the court or officer to whom the application is made has no supervisory jurisdiction in reference to the offense charged, the existence, validity, and present legal force of the process can be inquired into. Where the supervisory jurisdiction does exist, a wider discretion is permitted in examining into the circumstances attending the arrest. The existence of the process is determined by inspection. Its validity depends upon the existence of the legal precedents to its issuance. If the preliminary pro-

ceedings have been merely defective or irregular, the process is not thereby invalidated, but illegality in those proceedings makes the process void.

No one ever has, and probably, from the nature of the subject, no one ever can, state in general terms accurately the distinction between an irregularity and an illegality, as used in this connection. An irregularity is defined to be "the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or manner." "Illegality is properly predicable of radical defects only, and signifies that which is contrary to the principles of law, as distinguished from mere rules of procedure. It denotes *a complete defect* in the proceedings." (Hurd on *Habeas Corpus*, p. 333.)

However little light this statement may shed upon the subject, it is probably as correct a general definition as can be given of the terms. Irregularity is a minor defect, and illegality is a radical defect; and all beyond this must be settled by a comparison of individual decided cases.

In the present case, the only foundation for the warrant is the indictment. A warrant of the court which did not recite the indictment would be void upon its face. The fact of its issuance does not presuppose the exercise of any judgment or discretion on the part of the court; but it rests for its validity upon the validity of the indictment. An indictment could only be found by a grand jury. And in order that a body of men should constitute a grand jury, they must have been procured and organized substantially in accordance with law. As the sole authority for the arrest is the finding of the grand jury, without which the court has no jurisdiction of the process, I claim that the legal existence of that body is a necessary preliminary to a valid warrant, and that illegality in its constitution is one of those radical defects which makes the process not only erroneous, but void. The fact that the Constitution of the United States says that "no person shall be held to

answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," shows how important an element this body is considered to be in a criminal procedure of this character, and justifies me in claiming the illegality in its formation to be among the radical defects, which may be inquired into collaterally by this writ, which the Constitution also makes the bulwark of personal liberty.

The following cases seem to me to sustain the right of this court to make this inquiry:

An indictment found by an illegally constituted grand jury is not merely irregular, but void.

McLean's Rep., vol. 6, p. 609–10.
Doyle *vs.* State, 17 Ohio, p. 222.

Upon habeas corpus, the legality of the constitution of the court, whose power is questioned, may be inquired into, and if found illegal, the process is void.

Brooks *vs.* Adams, 11 Pick., 441.

The regularity of the warrant and the jurisdiction of the court over the subject-matter are never conclusive; but on habeas corpus the legality of the steps taken by the court to acquire jurisdiction of the person and the process may be inquired into, and the invalidity of the warrant thereby established.

Ex parte Bollman, 4 Cranch, 75.
Nelson & Graydon *v.* Cutter, 3 McLean, p. 326.
Ex parte Beatty, 12 Wendell, p. 229.
United States *v.* Hamilton, 3 Dallas, 17.
State *v.* Stallnaker, 2 Brevard, 44.
Slocum *v.* Sims, 5 Cranch, p. 363.
Reynolds *v.* Ovis, 7 Cowen, p. 268.
Hurd on Habeas Corpus, pp. 350–51, and 364–65.

But where the court or judge, to whom the application is made, sustains such relation to the tribunal whose process is in question, that it has, in the ordinary course of

justice, a revision of its decision in the particular case, a much larger discretion may be exercised on *habeas corpus*, and the prisoner may be discharged from process which is only voidable and not void. 354 & 359

Hurd on Habeas Corpus, 351–52, and cases there cited.

In the case at bar, the judge, to whom the application was made, stands in this position. It was, therefore, his duty to have entertained the application, even if the affidavit had shown only irregularity, and not illegality, in the proceedings.

Second. Upon the main proposition, to wit, the legality of the mode pursued in forming this grand jury, I have to say, in reply to the argument of the Attorney General:

1st. It seems useless to discuss or refer to the common law mode of procuring jury panels, for the reason that the hypothesis of a vacuum in legislation, which alone would make it relevant, has no foundation in fact. It is not denied that the mode of procuring jury panels is a "rightful subject of legislation." The authority to legislate upon it was therefore expressly conferred by the organic act upon the territorial legislature, and that body has passed a law fully regulating the subject. If this legislation is invalid, it is because it is in conflict with legislation by Congress upon the same question. If Congress has not regulated it, then the territorial legislature, with, in that event unquestionable authority, has; and there is no room for the operation of a common law rule.

2d. It is conceded by the learned counsel, that the jury act of 1840 does not apply to the courts of the Territories. I think it clear that no other act of Congress, regulating the subject, is now in force. The first provision upon the subject was in section 29 of the act of 1789, entitled "An act to establish the judicial courts of the United States." This act established no territorial courts, but only the circuit and district courts, to which was given a portion of the judicial power granted by the IIId article of the Con-

stitution. The act of 1800 was, by its title, an act to amend the judiciary act of 1789, and consisted of one section, which was a substitute for that portion of section 29 of the original act which provided for the formation of juries. The act of 1840 is entitled "An act to amend," &c., the amendatory act of 1800, for which it is, in its turn, evidently a complete substitute. The general frame of each of the provisions is the same, and the phraseology very similar. Where the words were changed, it was evidently done for the purpose of changing the law, and not for the purpose of making two laws upon the same subject. Thus, the act of 1800 says, "*jurors to serve in the courts of the United States shall be designated by lot or otherwise, in each State or district respectively, according to the mode,*" &c. The amendatory act of 1840 says, "*jurors to serve in the courts of the United States in each State respectively shall have the like qualifications * * * *, and shall be designated by ballot, lot, or otherwise, according to the mode,*" &c. Under well-known rules, the act of 1840 was a repeal of the former provisions upon the same subject; and if the words *in all cases*, in the act of 1789, and the word "district," in that of 1800, could be awarded any such force as is claimed for them in the brief of defendant, then the act of 1840, from which those words are carefully excluded, is a distinct declaration that thereafter the provision should have no such extent.

3d. The case of Orchard *v.* Hughes, cited by defendants, is simply a decision that, where the organic act gave to a court "chancery jurisdiction," this term embraced the well-known mode of procedure and practice in chancery, as distinguished from that at common law, and placed them, therefore, beyond the reach of territorial legislation. Nothing in the decision indicates any consideration of the question of the relation of the territorial courts to the federal Government, or any intention of disturbing the doctrine in that respect, so firmly settled in the cases of American Insurance Company *v.* Camten, and Bemen *v.* Poster.

4th. The 7th section of the act of 1856, cited by defendant, seems to me to have a different bearing from that sug-

gested by counsel for the defendant. It strongly sustains the position that, in general legislation by Congress respecting the courts of the United States, the territorial courts are not included, but to be embraced require special mention. The language is:

> "The several circuit and district courts of the United States, the district courts of the territories, and the circuit court of the District of Columbia, shall have the power to discharge the grand juries of the respective courts whenever they shall be of opinion that the public interests will not be subserved by a further continuance of the sessions of said grand jury."

No one has ever questioned the *power* of Congress to legislate for anything and everything pertaining to the territorial courts, or any branch of the territorial government. But when we find that, in legislation designed to apply to them, Congress has thought it necessary to mention them specially, and that it designates them, not, as does the judge below, as "district courts of the United States," but as "the district courts of the territories," it certainly adds weight in favor of the conclusion otherwise reached, that they are not included in general legislation concerning the courts of the United States. The inference that, because Congress has chosen to legislate upon the discharge of grand juries, it may therefore be presumed to have legislated in relation to the formation of such juries, is unwarranted. The two subjects are entirely distinct. The discharge of a grand jury, even if ill-judged, could only affect the public order. The formation of the jury panel affects nearly the rights and liberties of the individual citizen. The latter the people have jealously guarded and they have kept its control close to themselves. The suggestion loses all its force, when it is remembered that the two subjects of discharge and formation are, by the respective acts concerning them, kept equally distinct in the United States courts proper. The circuit or district judge may discharge, but the State Legislature prescribes the mode of formation. In strict analogy, while the territorial judge may discharge, the territorial legislature regulates the mode of formation.

5th. I cannot agree with the concluding clause of the

argument for defendant, that the *spirit* of the organic act of this Territory and of the legislation by Congress favors the practice inaugurated by the Utah court. So far from manifesting any desire of making the courts independent of the people in this respect, every act which Congress has framed has aimed to place its regulation within the control of the local legislative tribunals. There is not a court within its control, not even those strictly federal tribunals which exercise no judicial power except that conferred by the Constitution of the United States, that is not by the explicit command of Congress compelled to follow the regulations prescribed by the local legislatures.

The original act of 1779 requires that the courts should be guided by the enactments of the State legislatures. The act of 1800 is to the same effect. The principal object of the act of 1840 was to require the courts, instead of maintaining the system established by these legistatures, at the time of the passage of the original act, to conform to whatever changes in local legislation might be made upon this subject in the future. If the organic act of the Territory of Utah had not committed to the legislature elected by its people the control of the mode of forming panels of grand and trial jurors in its courts, it would have constituted a solitary and arbitrary exception to the spirit of congressional legislation upon this subject for the past eighty years.

C. J. HILLYER,
For Plaintiff in Error.

Supreme Court of the United States.

JETER CLINTON *et al.*, Plaintiffs
vs.
PAUL ENGELBRECHT *et al.*, Defendants.
} In error to the Supreme Court of Utah Territory.

BRIEF OF DEFENDANTS.

The proceedings in this case, in the district court, were had under the civil code of Utah, and therefore in many particulars the common law practice has been departed from, a fact which should be borne in mind in examining the record.

There is a statement of but three errors, made in plaintiffs' brief, to wit:

1st. That the district court erred in sustaining the demurrer to the challenge of the array of the jury.

2d. That the district court erred in refusing the instructions asked by the plaintiffs in error, also erred in the instructions given.

3d. That the complaint does not state a cause of action.

I. As to the 1st exception, it is in these words: "To this 'challenge the plaintiffs demurred, which demurrer the 'court sustained, and ordered the trial to proceed. To the 'sustaining of the demurrer and ordering the trial to pro-'ceed, the defendants then and there excepted." (Rec., pp. 27 and 54.)

There are two statements in the transcript made in pursuance of the Utah code, (Rec., pp. 25 and 52,) and in

neither of these statements, or elsewhere in the transcript, is the demurrer set out, so that, as to its form, the court is entirely left in the dark; also as to the question of law really presented by the demurrer, and decided by the district court.

The demurrer may have been special, and involved a question of practice. In a case like this, the court refused to consider *the exception.* (Young *vs.* Martin, 8 Wal., 354.

II. The plaintiffs in error waived their objection to the jury, by exercising their right to challenge jurors peremptorially and for cause. By their own act the array to which they first objected was entirely changed, and a new and different set of jurors obtained, and the body to which the challenge to the array raised objections was different from the one which tried the case.

They should have stood by their challenge to the array, and could not by their own act change the body of the jury, and go on with the trial, and avail themselves of the chances of a verdict in their favor, without also incurring the perils of a verdict against them. (The People against McKay, 18 John., pp. 212 and 217.)

No objection was made to the competency, bias, or favor of the jury, or the officer who summoned them; in fact, no objection was made to the array which tried the case, and which the plaintiff in error was active in forming. The exception is as to the form of empanneling the original array; the objection is purely formal and technical, having no substantial elements about it, and is therefore cured by the statutes of jeoffails.

III. The transcript shows that two appeals were taken: one from a judgment refusing a new trial, and another from the final judgment; and it is impossible for this court to determine from the record in which of these appeals the court below decided this question. Authority need not be

quoted on the question that this court will not review a decision refusing a new trial.

IV. The jury was legally empanneled. The 6th section of the organic act of Utah Territory provides, "*That the 'legislative power of said Territory shall extend to all rightful 'subjects of legislation, consistent with the Constitution of the 'United States and the provisions of this act.*"

The 17th section provides, "*That the Constitution and 'laws of the United States are hereby extended over and de-'clared to be in force in said Territory of Utah, so far as the 'same, or any provision thereof, may be applicable.*"

The Territorial Legislature has adopted the laws of Congress in this language: "That all questions of law, 'the meaning of writings other than laws, and the admis-'sibility of testimony, shall be decided by the court; and 'no laws, nor parts of laws, shall be read, argued, cited, or 'adopted in any court, during any trial, except those en-'acted by the Governor and Legislative Assembly of this 'Territory, and those passed by the Congress of the Uni-'ted States, when applicable; and no report, decision, or 'doings of any court shall be read, argued, cited, or adopted 'as precedent in any other trial." (Revised Stats. of Utah, p. 32, sec. 1.)

The 10th section provides, that "*There shall also be a 'marshal for the Territory appointed, * * * who shall 'execute all process issuing from said courts, (the district and 'supreme courts of the Territory,) when exercising their juris-'diction as circuit and district courts of the United States; he 'shall perform the duties, be subject to the same regulation and 'penalties, and be entitled to the same fees as the marshal of the 'district court of the United States for the present Territory of 'Oregon.* (9 Stat. at Large, 456.)

The statute defining the duties of the marshal of the district court for the Territory of Oregon refers, as in manner above, to the duties of the marshal of the district court for the Territory of Wisconsin. (9 Stat. at Large, p. 327, sec. 10.)

And reference is had in like manner to the northern district of New York, in defining the duties of the marshal of the district court of Wisconsin. (5 Stat. at Large, p. 14, sec. 10.)

And reference from the northern district of New York is made to the general duties of marshals of the district courts of the United States. (3 Statutes at Large, p. 235.)

The 27th section of the judiciary act provides, "That a 'marshal shall be appointed in and for each district for the 'term of four years, but shall be removable from office at 'pleasure, whose duty it shall be to attend the district and 'circuit courts when setting therein, and also the supreme 'court in the district in which that court shall sit; and to 'execute throughout the district all lawful precepts directed 'to him, and issued under the authority of the United 'States." (1 Stat. at Large, p. 67.)

It is further provided, "That the marshals of the several 'districts and their deputies shall have the same powers in 'executing the laws of the United States as sheriffs and 'their deputies in the several States have by law in ex-'ecuting the laws of the respective States." (1 Statutes at Large, p. 425.

Now, is the act of the Territorial Legislature and the amendment thereto, both of which are copied in full in the plaintiff's brief, to which reference is had, consistent with the provisions of the organic act of Utah? By an act of the Territorial Legislature of Utah, approved March the 3d, 1852, (Revised Statutes of Utah, p. 38, sec. 1,) it is provided:

"*That a marshal shall be elected by a joint vote of both* 'Houses of the Legislative Assembly, whose term of office 'shall be one year, unless sooner removed by the Legisla-'tive Assembly," &c.

"Sec. 2d. Said marshal shall have power to appoint one 'or more deputy marshals in each judicial district of said 'Territory, as the necessity of the case may require," &c.

"Sec. 3d. It shall be the duty of the marshal or any of 'his deputies to execute all orders or processes of the su-

'preme or district courts in all cases arising under the laws 'of the territory.

The 7th section of the organic act of Utah provides, "That all township, district and county officers, not herein 'provided for, shall be appointed or elected, as the case 'may be, in such manner as shall be provided by the Gov-'ernor and the Legislative Assembly of the Territory of 'Utah. The Governor shall nominate, and by and with 'the advice and consent of the Legislative Council appoint, 'all officers not herein provided for."

There is no law in Utah Territory to-day, nor has there ever been one, under which the office of Territorial marshal could or can now exist.

The marshal created by the statute of Utah, above cited, is neither a township, district, or county officer, and therefore must be nominated by the Governor, and by and with the advice and consent of the Legislative Council appointed.

Yet this officer, the Territorial marshal, is required to officiate in the selection and summoning the grand and petit juries for the district courts of Utah Territory, in all cases, both where the United States is a party as well as cases between individuals, and as well in enforcing the laws of the United States as in enforcing the laws of the Territory. The language of the statute is, "That when a dis-'trict court is to be held, whether for a district or county, ' * * * the clerk shall * * * issue a writ to the 'Territorial marshal." (See act quoted in plaintiff's brief.)

It is further made the duty of the Territorial marshal to assist in selecting the grand and petit juries, and then summon and return the same. This duty, by the organic act, is clearly cast upon the United States marshal, certainly at least when the district and supreme court of the Territory are exercising their jurisdiction as circuit and district courts of the United States, and for the performance of the latter duties the United States marshal is certainly entitled to all fees and emoluments arising from the same.

But the Territorial statute makes no such distinction, and this court cannot do so. The Utah statute is an entirety, and is either good in whole or bad in whole. In the former case the acts of Congress defining the duties of marshal are rendered nugatory; in the latter case it is futile to attempt to carry out the Territorial statute; it is not possible to carry it into execution.

Again, it is further enacted, by the law of Congress organizing the Territory of Utah, "That the judicial power 'of the territory shall be vested in a supreme court, district 'court, probate courts, and justices of the peace."

Yet the act of Utah, providing for the procurement of grand and petit jurors for the district courts of Utah, makes it the duty of the county court in each county to make out the jury list, and the clerk of that court is designated as the person to assist in drawing the jurors. No such court, and no such officer as clerk of said court, can have any legal existence in Utah, because the courts in which the judicial power of the Territory is lodged are specifically named in the organic act, and the county court is not among them. The county court has no real existence, but is an ideal body only; an ideal court, which is not capable of performing any legal act. The terms of the Utah statute are, "that the county court shall make out a list." Can an ideal body, which has no legal existence, do an act? How then is this list to be obtained? Can the court usurp legislative power, and substitute somebody else in place of the county court and its clerk?

When, and in what class of cases, do the district courts of Utah exercise their jurisdiction as "district courts of the United States?"

By the 6th section of the judiciary act (1 Brightly's Dig., 793) this court is authorized to make rules of practice for the district and circuit courts of the United States.

In pursuance of this authority, they have made rules of practice for said courts, and in the case of Orchard *v.* Hughs, (1 Wall., 73,) in a civil case between individuals, these rules were held to apply to the district court of a Territory.

And subsequently to this decision this court made the 94th rule in equity, which is as follows:

"That in suits in equity for the foreclosure of mortgages 'in the circuit courts of the United States, or in any court 'of the territories having jurisdiction of the same, a decree 'may be rendered for any balance that may be found due 'to the complainant, over and above the proceeds of the 'sale or sales, and execution may issue for the same."

The authority for making this rule is the case of Orchard *v.* Hughs, and the act of Congress authorizing this court to make rules of practice for the district and circuit courts of the United States.

It follows that the district courts of the Territory exercise their jurisdiction as district courts of the United States in all adjudications between individuals, otherwise the decision of Orchard *vs.* Hughs is erroneous, and the 94th rule of this court of no binding force. (See also Hunt *v.* Palao, 4 How., 589.)

A decision of this court has the authority of law to a Territorial judge in all cases within its scope.

The United States marshal, then, by the express terms of the organic act, was the proper officer to execute the venire for the jury.

The statute of the Territorial Legislature is not only inconsistent with the organic act, but is in direct conflict with the acts of Congress on the subject of grand and petit juries.

The act of Congress regulating criminal proceedings provides: "It shall be lawful for the grand juries, empanneled 'and sworn in any district court, to take cognizance of all 'crimes and offenses within the jurisdiction of said circuit 'and district courts. * * * That no grand jury shall 'hereafter be summoned to attend any circuit or district 'court of the United States, unless the judge of such dis-'trict court, or one of the judges of the circuit court, shall, 'in its own descretion, or upon a notification by the dis-'trict attorney, that such jury will be needed, order a venire 'to be issued therefor: *Provided*, That nothing herein shall

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'prevent either of said courts in term directing a grand 'jury to be summoned and empanneled." * * * (1 Brightly's Dig., 223, sec. 115.)

It is a fact worthy of note, that the grand jury under this act has cognizance of all offenses within the jurisdiction of the court. How, then, in a Territory, are two grand juries to be obtained, one to sit upon United States cases, the other upon Territorial cases; and why have two petit juries. If the views of the plaintiff's counsel be correct, such must be the result, and there must also be two executive officers and two prosecuting attorneys for each district court of the Territory.

It is further enacted by Congress, that "the clerks of the 'district courts of the United States shall not issue a pro-'cess to summon, or cause to be returned to any session 'of the said courts, a grand jury, unless by special order of 'the district judge. (1 Brightly's Dig., p. 232, sec. 20.)

Again, it is enacted:

"Every grand jury empanneled before any district or 'circuit court of the United States, to inquire into and pre-'sentment make of public offenses against the United 'States, committed or triable within the district for which 'the court is holden, shall consist of not less than sixteen, 'and not exceeding twenty-three persons." (2 Brightly's Dig., p. 165, sec. 66.)

The same section further provides, that the marshal shall summon talesmen in case it becomes necessary.

These provisions of Congress are so antagonistic to the Utah statute, that it is impossible to give effect to one without destroying the other. Then, which must stand?

I shall not contend that the first clause of the 29th section of the judiciary act, quoted by the Attorney General in the case of Hosea Stout, (1 Stats. at Large, 88; 1 Brightly's Dig., p. 221, sec. 102,) applies to a Territory, because, by its very terms, it is limited in its operation to the States; (see Kent, 433; The Corporation of New Orleans *v.* Winter *et al.*, 1 Wheat., 91; Hepburn & Dundas *v.* Elley, 2

Cranch, 445;) but the latter clause is general, and I think does apply to the Territories.

Again, it is enacted, that "jurors, to serve in the courts 'of the United States, shall be designated by lot or other-'wise, in each State or district respectively, according to 'the mode of forming juries to serve in the highest courts 'of law therein now practiced, so far as such designation 'shall render the same practicable, by the courts and 'marshals of the United States."

This statute is general in its operation, and I think it applies to a Territory.

The probate courts of Utah Territory have been invested, by the Territorial Legislature of Utah, with jurisdiction concurrent with the district courts of the Territory. They are invested with original jurisdiction, both civil and criminal, and as well in chancery as at common law. (See Revised Statutes of Utah, p. 31, sec. 29.)

So that the highest courts in Utah are the probate courts, district, and supreme courts.

And from the organization of the Territorial Legislature up to the present time, jurors have been selected in the probate courts as at common law, and they were so selected in the district court until the passage of the act of January 21, 1859, by the Territorial Legislature.

By the 10th section of an act of the Territorial Legislature, which is now in force, and passed in 1853, regulating criminal proceedings, it is enacted: "In jury cases the 'court shall issue an order, requiring an officer to summon, 'for that purpose, a reasonable number of judicious men, 'residents of the county, out of which twelve, or a less num-'ber if agreed upon, shall be selected, and if the number 'first summoned is not sufficient, the officer shall continue 'to summon till the number is complete."

17th section of the same act: "When necessary, the court 'shall issue an order, requesting an officer to summon fif-'teen judicious men, residents of the county, for a grand 'jury."

The manner of obtaining the jury in the case at bar is

not unusual or anomalous in Utah, but is one most pursued there in practice.

If the act of the Territorial Legislature of January 21, 1859, is void, (as it most certainly is,) by reason of its conflict with the organic act of the Territory and the laws of Congress, then how may the jury be lawfully obtained. The answer is as at common law, and in accordance with the mode most commonly practiced in said Territory. As to the manner of selecting juries at common law, see

The United States *v.* The Insurgents of Pennsylvania, 2 Dall., 341.

United States *v.* Fries, 3 Dall., 515.

By the 9th section of the organic act of Utah the district and supreme courts are respectively invested with chancery as well as common law jurisdiction.

This provision, by its own force, authorizes the district court to resort to all the requisitions of the common law in the administration of justice. This provision means, when analyzed, that the district courts of the Territory may try all cases in accordance with the practice of common law.

And no power, except the one which invested said courts with this power, can take it away or abridge or modify the same.

And any law of the Territorial Legislature which attempts to do so is inconsistent with the organic act.

V. As to the second exception, some eighteen or more instructions asked by plaintiffs in error, and refused by the court, by one general exception is objected to in mass. (See from page 37 to 41, from 63 to 68, printed record.) That some, if not all, of the instructions asked should have been refused, is too manifest to discuss.

On the effect of general exceptions, see 1 Wal., 645; Rogers *v.* The Marshal, 2 Wal., 328.

VI. As to the third exception, in answer to the argu-

ment of plaintiff's counsel, the court is referred to page 59 of the Revised Statutes of Utah, sec. 102, and page 61, sec. 116. (1 Bishop's Criminal Law, sec. 897, and cases cited; People *v.* Stevens, 13 Wend., 341; Batchly *v.* Moses, 15 Wend., 215.)

VII. In conclusion, there is no bill of exceptions properly signed and sealed. Sheppard vs Mason 6 How 260 Act 329-330-333- Utah Code

Respectfully submitted,

R. N. BASKIN,
Of Counsel for Defendants.

18 How 212-257

(March 3 1849
4 Stat 403-)

4 How. 591-
Courts of United States
& Seizure act &
Territory-
& Rev Stat Utah, 27-
69 Code-

Supreme Court of the United States.

DECEMBER TERM, 1871.

JETER CLINTON ET AL., Plaintiffs,

vs.

PAUL ENGLEBRECHT ET AL., Defendants.

IN ERROR TO THE SUPREME COURT OF TERRITORY OF UTAH.

REPLY TO BRIEF OF DEFENDANTS IN ERROR.

First. The exception to the legality of the jury panel is made in proper form. The statement on appeal, signed by the district judge, is, under the Utah practice, a bill of exceptions. (Laws of Utah, p. 78, sec. 330.) The facts in relation to the manner of procurement of the jury panel are stated, independent of the written challenge by defendants' counsel, from line 6, page 53, to line 4, page 54, of record, and the signature of the judge warrants the correctness of this statement.

At the proper time, "when the case was called for trial," the then defendants filed a written challenge to the panel, which states distinctly and specifically the objections to the mode of its procurement. The facts were not disputed. If under the facts the jury panel was illegal, it was the duty of the court, upon the filing of the objection, to dismiss the jury, and continue the case. Instead of that, it overruled the challenge, by sustaining the plaintiffs demurrer, "and ordered the trial to proceed." To this ruling the defendants then and there excepted. No particular form of objection was required. It might have been oral; and, if then in any manner made part of the record, would

have been equally valid. (See Laws of Utah, p. 50.) Neither was any formal or written demurrer to this objection necessary by the plaintiffs. It may have been, and and for aught that appears was, oral. The statement in the record shows merely that no issue was taken upon the facts, but only upon the law. The court ruled that, conceding the facts, the panel had been legally procured; and to this ruling the exception was taken.

Second. Neither the case cited in 18 Johnson, or any other case, has held, that after an objection, ruling, and exception to the legality of the panel, a subsequent exercise of the right of challenge was a waiver of the exception.

Third. The Supreme Court acted on the appeal from the final judgment of the district court by an affirmance of that judgment. (Record, p. 72.) Whether they also decided the appeal from the order refusing a new trial is immaterial.

Fourth. It is not denied, in the present argument for defendants in error, that the mode of procuring panels of jurors is a rightful subject of legislation, and, therefore, within the province of the Territorial Legislature. The validity of the Territorial statute is denied for two reasons: 1st. That the Territorial marshal is not an officer competent to serve process; and, 2d, that the county court is not a tribunal competent to select the jury lists in their respective counties. As to the marshal, it is evident, not only from the general grant of legislative power, but from the language of the 10th section of the organic act, that it is left to the Territorial legislative body to designate the officer for the service of process, in cases arising under the laws of the Territory. The language is: "There 'shall also be a marshal for the Territory appointed, who 'shall hold his office for four years, unless sooner removed 'by the President, and who shall execute all processes 'issued from the said courts, when exercising their jurisdiction as circuit and district courts of the United States.

The 9th section determines clearly when these courts may exercise the jurisdiction of circuit and district courts, to wit: "In all cases arising under the Constitution and laws of the United States." The case at bar is certainly not one of those, and the United States marshal had no authority to serve any process in this action. If the formation of general jury panels is a subject distinct from the proceedings in any particular case, and the order for its procurance not a process within the meaning of the law of Congress above quoted, then, by the general grant of legislative power, the whole proceeding was under the control of the Territorial Legislature. If not, and the order be deemed a process within the meaning of the term, as used in the 10th section of the act, then its service, in a case coming under a Territorial statute, was expressly excluded from the duties of the United States marshal, and left to be provided for by the Territorial Legislature. It is provided in the 7th section of the organic act, that township, district, and county officers shall be appointed or elected as the Legislative Assembly and Governor may determine. This would authorize the appointment in this mode of officers for serving process in Territorial cases in the district courts. The Legislature, by act approved by the Governor March 23, 1852, (Laws of Utah, p. 38,) appointed a marshal, and gave him power "to appoint one or more deputy marshals in each 'judicial district of the Territory;" and section 3 provided, "It shall be the duty of the marshal, or any of his deputies, 'to execute all orders or processes of the supreme or dis-'trict court in all cases coming under the laws of the Ter-'ritory."

Under this act the marshal and deputies were appointed, capable of serving process in Territorial cases in each of the judicial districts, and were therefore district officers within the meaning of the language of the 7th section.

But suppose this were not so, it could be of no avail to the defendants in error. The jury found in the case at bar was not selected according to law, and this fact was shown by plaintiffs in error at the time of making the ob-

jection. If it was then sought to excuse this non-compliance, by showing that the laws could not be executed, it was incumbent upon them (the defendants in error) to establish this, fact and negative the existence of a Territorial marshal capable of executing the powers. This cannot be done by simply referring to the act of 1852. For aught that appears in this record or elsewhere, there may have been a Territorial marshal nominated by the Governor and approved by the Assembly in the precise manner in which defendants' counsel assert that it should have been done.

Again, the main purpose of the jury act was to provide a system by which no discretion should be left to the officer in summoning the panel. If an improper officer had been designated as the one to whom the writ should be given, this would not authorize the rejection of the entire act, but merely a substitution of the proper officers, who in other respects should be governed by the terms of the law.

2d. As to the county court, it will be sufficient merely to examine the act by which the tribunal is created to ascertain that there is no ground for the objection. (Laws of Utah, p. 206.) It is not a judicial, but a ministeral organization. Had it been called a "board" instead of a court, the objection would probably have never been made. The duty required of it in the jury act is purely ministerial.

Fifth. I have heretofore stated my views of the scope of the decision in Orchard *vs.* Hughes. The use attempted to be made of it by defendants' counsel is certainly extravagant. If by reason of any principle involved in that decision the Territorial Legislature cannot provide the mode for the formation of a jury in a common law case, arising under a Territorial statute, then it can pass no act respecting any judicial proceeding which shall be binding upon the courts of the Territory. Every provision of the civil practice act, and of the mode of procedure in criminal

cases, is, as to these courts, void, and they have been mistaken in ever looking beyond the acts of Congress and the rules of this court. I am sure the counsel for defendants does not intend to go to this extent, and if not, the decision referred to has no relevancy to the present question.

Sixth. The laws of Congress concerning jurors in the United States courts have no application to the Territories. (See briefs in case of Stout *v.* People.) The new provisions referred to in the present case are not only by their terms inapplicable to the Territorial courts, but do not even treat of the subject of the formation of panels of jurors.

Seventh. The exception to the charge of the court is correctly taken, under the provisions of the practice act of the Territory. (Laws of Utah, p. 50, secs. 188, 189, and 190.) The supreme court of the Territory was bound by the statutes in determining the validity of the form of the exception. In this court, whose province it is to determine whether there was error in the action of the Territorial court, the same rule will govern.

C. J. HILLYER,
Attorney for plaintiffs in error.

Rec Instr - 206 -

Sec 4 -

Sec 9, Section Line
as surveyed by
Land of Utah -